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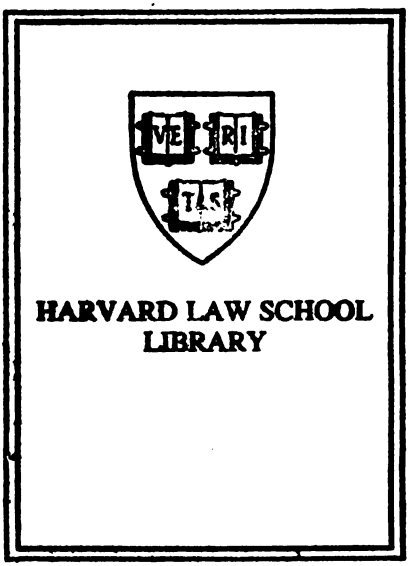

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 7, 1889 TO JULY 11, 1889

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 75.

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REPORTER'S NOTE.

In issuing volume 75, out of its numerical order, a statement of the *status* of the work of this office seems to be desirable.

On the passage of the act, approved June 29, 1889, providing for additional clerical assistance, which was limited to one year, an estimate was made of the "back work," so called, and it was ascertained that the *unpublished* opinions filed prior to June 1, 1889, would fill nine volumes, and it was further estimated that the work of the June and October terms, 1889, and of the January and April terms, 1890, would make five volumes, which latter estimate is *fully* verified by the opinions filed and to be filed prior to Jaunary 1, 1890.

Since July 1, 1889, one volume per month has been prepared and printed; three volumes have been published, and volumes 68 and 69 will be issued, and volume 76 completed ready for binding, during the present year.

On consultation with the Court it was decided to take up the current work, and at the same time bring up the back work, which accounts for the advance issue of volume 75.

My intention is to have the entire work, including the opinions filed at the June term, 1890, published by October 1, 1890.

W. D. FULLER,
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GEORGE MARTIN.

At the opening of Court on Tuesday, October 8, 1889, Mr. E. S. Eggleston presented to the Court a portrait of the late Hon. GEORGE MARTIN, in behalf of the members of his family, and, in that connection, spoke as follows:

May it please your Honors:

By the members of his family I have been requested to present to the State, through you, a picture of the late Chief Justice MARTIN; and in so doing I am expected to say something of the history and character of its original.

This duty is in no sense to me irksome, but it is to some extent burdensome; burdensome because I feel sensibly my inability to do justice to the subject upon which I am to speak. But to the extent of my ability, what I shall say will be an expression of the gratitude which I owe to the late Chief Justice, and a glad tribute to his great worth.

Judge MARTIN was a New Englander by birth; born in the State of Vermont, and graduated at Middlebury College in that state. He also pursued his legal studies in that state up to the time of his admission to practice. These studies were pursued under the disciplining influences of the old English common-law system, up to that time, at least, rigidly adhered to in that state.

I know of but one man in this State to whom I could apply for information concerning the student days of Judge MARTIN. The most I learn is that, almost immediately after his admission to the Bar, he came to this State and located in the then village, now city, of Grand Rapids, and had for his contemporaries such men as Charles P. Calkins, a care-

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ful and painstaking student, and a close and technical adherent of the principles and practices of common law; Simeon Johnson, Mr. Henry Osgood, and Julius C. Abel. The latter was a man of but slight culture, but of much more than ordinary mental capacity; he had a pretty thorough acquaintance with Cowen's Treatise, and an unbounded confidence in himself. Coming constantly in contact with Mr. Abel, Judge MARTIN soon became acquainted with all the practices of bush-whacking at law, and was compelled by his shrewd and wily opponent to bring to bear all the resources of his eminently logical mind, with all its thorough training.

He had also, as a competitor, the well-trained lawyer and silver-tongued orator, the Hon. Thomas B. Church.

Judge MARTIN for some years held the office of justice of the peace of the village of Grand Rapids. So meager were the proceeds of a legitimate law practice at that time, that lawyers of acknowledged ability were glad to accept almost any kind of extraneous help, such as insurance agencies and land agencies, to eke out a living.

Judge MARTIN was at once recognized as a well-trained and well-equipped lawyer, and took special eminence as an equity practitioner, not only at home, but throughout the State.

In the year 1848 he was elected to the office of county judge of Kent county, which office he held with credit and ability up to January 1, 1851.

At this time I made the acquaintance of Judge MARTIN. I had just arrived in the city of Grand Rapids, bringing with me letters of introduction to him from Judges Seth Sill and James Mullett of Buffalo, New York. From that time, until the fall of 1861, I was perhaps more constantly with Judge MARTIN, and had a more intimate acquaintance with him, than probably any other man, and visited with him, twice a year, every county in which courts were held from Grand

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Traverse to Allegan, up to the time of the separate organization of the Supreme Court of this State.

Judge Mundy occupied the bench of the circuit court of Kent county from the time of his appointment until his death, in March, I think, 1851. From this time until September of that year the bench of that circuit remained vacant. During that year Judge MARTIN was appointed judge of that circuit by the late Governor Barry. At the spring election of 1852 he was elected judge of that circuit over the Hon. Alexander Bell by a very handsome majority, although the circuit was at that time very strongly Democratic.

By virtue of his office of circuit judge he was also a member of the then Supreme Court, and he continued to discharge the duties of both courts until the organization of this Court, to which he was elected in the spring of 1857.

After Judge MARTIN left the bench of the county court he opened an office for the practice of his profession, and kindly offered me a seat in it. Between that time and the time of his appointment to the circuit court we read together Story's Equity Jurisprudence, Story's Equity Pleading, Chitty's Pleading, and Greenleaf on Evidence.

To these studies Judge MARTIN brought a mind thoroughly imbued with the principles of, and the distinction between, equitable and common-law jurisdiction as understood and practiced at that time,—a mind richly stored with the fruits of early study.

Judge MARTIN had a mind naturally logical, and well adapted to the study and practice of the law. He was not a plodding or voracious reader, but he was ready and quick of comprehension and analysis, and had a most retentive memory. He had been in his early days a close student of his profession. He was indeed a scholar in his profession. He was thoroughly well acquainted with the principles of equity jurisprudence, and the pleadings and practices of the equity side of the court; he was equally well versed in the English

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common law, and had a close and technical knowledge of that most completely logical system of pleading.

He loved the law,—he loved the study and application of its principles. He loved it because of the grandeur and loftiness of the principles it inculcated. He loved the system because it is based upon principles eternal, as are Truth and Justice, principles eternal as God.

He loved to discuss the equitable principles that underlie the whole grand structure of the English common law; the logic of its forms and modes of procedure, and their fitness and adaptation to the ends and purposes of justice.

He loved to read and discuss the opinions of Chief Justice Marshall, to point out their logic, the terseness and simplicity and purity of their style, and, above all, the sterling integrity of the man.

He loved to read the speeches of Webster, and comment upon the solidity and force of his logic, and the loftiness and grandeur of his oratory. He was a great admirer of Chief Justice Parsons, and used to say that the first twelve volumes of Massachusetts reports were all good law.

He greatly admired the writings of Mr. Greenleaf, and had studied well his work on Evidence, and his familiarity with it came vastly to his assistance in the discharge of his duties as a *nisi prius* judge, and made him ready and quick in the decision of the legal questions that came before him.

He was genial and light-hearted, almost to boyishness, in social intercourse. On the bench he was dignified, but kind, gentle, courteous, helpful, especially to the inexperienced members of the Bar.

What he was as a member of this Court some of your Honors know better than I can describe. His written opinions proclaim more loudly his fitness and qualifications for the high office he held than can any language that I can utter. Models of simplicity, tersely logical, at the same time broad and comprehensive, his opinions have built for

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him a monument more enduring than sculptured marble or storied halls.

Judge MARTIN achieved a position of eminence as a jurist, and his work has done honor to the place he occupied. To worthily occupy a position upon the bench of this Court is a proud eminence. And I may here say, without impropriety, that no other judicial tribunal in all these broad lands, in the same length of time, has won a prouder distinction, or has done more than has this to establish correct principles of judicial decisions, to establish order and regularity in all commercial and traffic relations. It has done vastly much to form and fashion the character of this people; to mold and fix the destiny of this, to-day, grand commonwealth.

This Court came into existence just when a new era was dawning; just as the tide of emigration from the East to westward was beginning to set in; just as the vast resources of the great West began to be developed, and new and more rapid means of transportation were required, new modes of commercial traffic and exchange sprang into existence. It came into existence just as invention and development had made practical the application of steam-power to the transfer of freights and passengers upon the great lakes, and across the vast regions that lie between the great rivers and the Atlantic sea-board; just as the telegraph had made neighbors of distant cities; just at a time when huge aggregations of capital, and private corporations to wield them, became necessities; when new cities, clothed with important municipal powers and concessions, were springing up all over the land, and new questions of great importance grew out of them.

New questions were being constantly brought for consideration and settlement by this Court. For the settlement of these questions broad and comprehensive minds were required, —minds capable of patient research and profound thought, minds keen in analysis and rapid in combination. It is suffi-

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cient to say that the work has been well and ably done, making its opinions recognized standards of reference, not only at home, but through all the states, and in the highest tribunal of the land.

In the settlement of these questions Judge MARTIN took an important part, and rendered most efficient aid.

A wise, untrammeled, and impartial judiciary has in all ages of the world been the matrix of the people's morals and the protector of their liberties. The Arœpagus of Athens reached the general morals of society, and the political affairs of state. Rome owed much of her greatness to the *tribuni plebis*, and to the influence which they exerted in checking the usurpations of the aristocratical element. They possessed the power of intercession against the decrees of the senate, and protected the rights of oppressed individuals.

The judicial tribunals of our own and the father-land have spread far and wide through all civilized lands the grand principles of the English common law, until the people no longer look to the Pandects of Justinian for the equitable principles that should control in the administration of justice. And it is the proud boast of the Anglo-Saxon that its judiciary affords an invulnerable shield against all usurpations by executive power, and a faithful expounder of constitutional law, and a sure protector of all constitutional rights.

When I look back upon the history of this Court and remember that GEORGE MARTIN was one of its organizers, and its first Chief Justice, that his learning and his ability contributed largely to establish its character and achieve its renown, when I remember the unsullied purity of its ermine, the wisdom and solidity of its judgments, I can only repeat what I have already said: To have worthily occupied the position of Chief Justice of this Court is a proud eminence.

When I look around me and see the names of the great men whose likenesses adorn these walls, I can but feel that it

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is a proud thing to have an honored niche in this temple of justice.

It is fame enough for any man, to say of him that he has sat upon the bench of this Court, a worthy associate of such men as COOLEY and CHRISTIANCY and GRAVES; and more than all, as I know my brothers who hear me to-day will heartily say, with the eminently learned, venerated, and loved Nestor of the Bar and Judiciary of this State. I cannot feel that I am wanting in delicacy in the utterances that I have made; it is the feeling of my heart; it is the glad tribute of the people of this State to the venerable man who has occupied a seat upon this Bench, honored and loved by the members of the Bar for more than thirty years. I have wanted to pay this feeble tribute to the worth of these noble men, with whom in my humble capacity I have been permitted to associate for so many years.

I look back upon the history of the Supreme Court of Michigan, and find that it is not equal in years with my own; that it has been made within my own recollection; and when I look again, and not a face looks down upon me from these walls but I have been more or less familiar with, I can but have a feeling of self-gratulation that I am permitted to stand here to-day and make this offering.

I ask, then, if your Honors please, that this portrait of the late Chief Justice MARTIN may be permitted to hang upon the walls of this room, among those of the men whose names have not only graced the history of this august tribunal, but have also added honor and luster to the name and fame of our loved State.

MR. WILLIAM P. WELLS ADDRESSED THE COURT FURTHER AS FOLLOWS:

I rise, wholly upon the impulse of the moment, to express to the representative of the Bar from the Western part of the State, who has offered this portrait of Judge MARTIN,

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and to your Honors, the gratification which the Bar in the Eastern part of the State will feel, that something has been done to place this portrait among those that grace these walls, and which will carry down to those who succeed us a knowledge of those who have made up the just fame and distinction of this tribunal.

When I came to the Bar, just before this Court was organized, Judge MARTIN was then, as has been said, by reason of his being one of the circuit judges, a member of the Supreme Court of the State,—and the youngest, as it appeared to me; and when this tribunal was organized, the estimation in which he was held by the people of the State was manifested in that he was elected Chief Justice, entering upon his duties in 18.8. It was my good fortune, as a young lawyer, to know him, and to see him in the discharge of his official duties, and I wish to express my own personal sense of the courtesy which he extended to me and to all the younger members of the Bar.

A just tribute has been paid to his character as a lawyer, and to the character of his mind. I was not aware of the nature of his studies, as has been detailed by his friend, but it always seemed to me that his opinions disclosed this fact, that he must at some time have studied deeply and diligently the great masters of the law. He had, it seemed to me, what we are accustomed to call "a legal mind,"—a mind adapted to investigate legal questions; and his opinions show great felicity and precision of diction in the expression of his views upon legal questions. Certainly, those who remember him will join in saying that he contributed, in his time, his share in the work which this tribunal has done, and by which it has established its position and its credit with the profession, and with the public.

He had his vicissitudes (as who has not), and the closing days of his life were darkened by ill-health; but if it is given to those who have passed beyond the veil to look back upon

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the scenes of this life, it will certainly be a source of gratification to him to know that, after this lapse of time, he is thus remembered.

MR. JUSTICE CAMPBELL RESPONDED AS FOLLOWS:

It certainly gives me a great deal of pleasure to see the picture of my old associate and chief placed where it ought to be,—on the walls of this Court-room.

I am forcibly reminded of the lapse of time, when I see that there are so few persons at the Bar to-day that could have been familiar with Judge MARTIN, as judge or lawyer. My own acquaintance with him goes back a great way; for while he was a member of the firm of Ball & Martin, and Ball, Martin & Withey, I was brought into some connections with him, in the western part of the State, and formed a familiar acquaintance at that time.

He was a member, for a short time, of the old Supreme Bench, that existed before the election of Judges under the Constitution of 1850. The election was a little earlier than stated by Mr. Eggleston. My recollection is that the election of circuit judges took place in 1851, and that, when Judge MARTIN was appointed by Governor Barry to fill the vacancy caused by the death of Judge Mundy, he had already been elected circuit judge. I may be in error about this, but that is my recollection. I had occasion to appear before the Supreme Court more or less at the time Judge MARTIN took Judge Mundy's place, and I was familiar with the Court at that time. I never tried many cases before Judge MARTIN as circuit judge, although I did some. I found him an exceedingly courteous judge, and I found that he was very popular among the people where he held his court.

When the Supreme Court which is now in existence was organized, Judge MARTIN was elected Chief Justice. At that time that office was a fixed office, and it was not changed until ten years thereafter so that it became an office held by

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rotation. Before that time it was a separate office, and Judge MARTIN held it.

In his personal relations he was exceedingly courteous at all times, and it was always a pleasure to associate with him. He was a man of thorough education; his mind had been very thoroughly trained, so that he was a scholar, in every sense of the term, when he came to the Bench. He had a natural legal mind. I think I never knew a man more naturally a lawyer than Judge MARTIN. He seemed peculiarly adapted to appreciate legal principles of all sorts, and he had a mind that applied legal distinctions very readily. His opinions will show a sagacity and aptitude in drawing such distinctions which is not often found.

So far as his reputation as judge is concerned, it is fortunate that every judge builds his own monument by his opinions which have been left in writing, and is himself measured by them. His opinions show his knowledge of legal principles, and his aptitude in dealing with those principles. They also show great elegance of diction. I think opinions can seldom be found written more elegantly, and at the same time more clearly, than those of Judge MARTIN, and they will compare in this respect with those that you find written by the most distinguished judges. I know, from my own personal intercourse with him, that he had made a very thorough study in all the elements of the law, both in England and America. His mind was exceedingly receptive, and he was familiar with the authorities and rules applied to questions that came up. As Chief Justice he had a great deal to do in following up the common rules of practice which the Court had to decide, and in this he was peculiarly apt in finding and appreciating these rules. He certainly will be remembered, in this State, as one of its foremost Judges.

The picture, on the whole, is a very good one, and well represents all that any one can remember of Judge MAR-

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TIN'S features. It is certainly gratifying to me, as to all the Court, that it is to be placed where those who now and hereafter practice at this Bar can look upon the face of this representative of our Court.

CHIEF JUSTICE SHERWOOD, ON RECEIVING THE LIKENESS, SAID:

We have listened with pleasure to the remarks of Mr. Eggleston on the presentation of this likeness of Judge MARTIN, and the donors will accept the thanks of the Court for it.

My only acquaintance with the Judge was that of a practitioner in this Court during the last years of his official life. But he is remembered as pleasant, agreeable, and dignified in manner, and a good listener to all that was said and done in the Court-room.

His legal ability was never questioned, and his work in this Court fully attests his eminent fitness for the judicial position he so long and honorably held.

The request of Mr. Eggleston will be granted, and the likeness assigned a place upon the walls of this room.

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JUNE TERM, 1889.

DAVID W. DAVIS v. ELLEN HAMMOND AND GEORGE H. HAMMOND, ADMINISTRATORS, ETC.

Contract for payment of sum on determination or settlement of suit to test validity of patent—Construction—Failure of title—Evidence of settlement.[1]

75 1
87 682

75 1
100 145

The contract sued upon is construed to provide for the payment of the sum stipulated for therein, in case of the settlement of the pending suit for the infringement of the patent assigned to defendants' intestate, regardless of whether the condition of the title to said patent would permit of a successful prosecution of said suit to decree or not, and, the jury having found the fact of such settlement upon sufficient evidence, the judgment below is affirmed.

Error to Wayne. (Gartner, J.) Argued October 31, 1888. Decided June 7, 1889.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Sumner Collins (*Ashley Pond, Charles M. Swift,* and *George H. Lothrop,* of counsel), for appellants.

Corliss, Andrus & Leete (*Alfred Russell,* of counsel), for plaintiff.

MORSE, J. June 16, 1868, William Davis obtained letters patent of the United States for improvements in apparatus for preserving meats, fruits, etc., and on June 22, same year, caused the same to be assigned to himself, Samuel H. and

[1] For full digest of points decided, see "*Table of Cases Reported.*"

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David W. Davis, to whom the patent was reissued September 15, 1868. Subsequently the interest of William Davis became vested in Thomas B. Rayl, a brother-in-law of Samuel H. and David W. Davis.

On July 1, 1869, Samuel H. and David W. Davis and Rayl licensed George H. Hammond and Caleb Ives to use the invention covered by the patent for transporting fruits and other perishable articles in refrigerator cars, the license fee being one-sixth of the profits. March 8, 1872, this license was enlarged so as to permit Hammond and Ives to relicense other persons to run their refrigerator cars.

Some time before September, 1880, Samuel H. Davis, Thomas B. Rayl, and John B. Corliss, as assignee in bankruptcy of David W. Davis, filed a bill in equity in the superior court of Detroit against Hammond and the bankruptcy assignees of Ives, praying for an account.

On the twenty-seventh of August, 1880, George H. Hammond, in his own name, and in the name of his licensors, began suit in the circuit court of the United States for the district of Massachusetts against Francis Jewett & Co., of Boston, for damages for infringement. Both this suit and the superior court suit were pending September 18, 1880.

On September 18, 1880, Samuel H. Davis and Thomas B. Rayl, in consideration of $4,000, as therein expressed, executed an assignment to George H. Hammond of the patent referred to, which recited—

"That at the execution and delivery of this instrument they [the grantors] are the lawful owners and holders of said invention, as secured by said letters patent, and of every interest and right therein, except such licenses as have been given for the use thereof for stationary boxes not used for transportation, and such rights as have been granted to said Hammond and Ives as hereinabove stated, and that they have good right and authority to make such conveyance."

On the same day the suit in the superior court of Detroit was discontinued by stipulation, and a contract entered into

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between George H. Hammond of the first part, and David W. Davis, Thomas B. Rayl, and Samuel H. Davis of the second part.

This contract related to the suit then pending in the circuit court of the United States for the district of Massachusetts, known in the record as the "Boston suit," and recited that George H. Hammond was then the assignee and owner of the letters patent, and also the possessor of the right to recover damages for any infringement of said letters patent at any time before the same were assigned to Hammond, and the commencement of the "Boston suit."

It contained the following agreements:

"Now, in case it shall be decreed by said circuit court that the said letters patent, so granted on the sixteenth day of June, 1868, and reissued on the fifteenth day of September, 1868, as above set forth, are valid, then, upon such final decree being rendered in said circuit court sustaining the validity of said patent upon the third and fourth claims thereunder, and without reference to exceptions or appeal to or from the decree or judgment of said court to the Supreme Court of the United States, or in case said first party shall make a settlement of the matters in said suit without proceeding to final decree, the said party of the first part shall pay to the parties of the second part, their executors, administrators, or assigns, the full sum of ten thousand dollars, for the use and benefit of themselves, or their representatives or assigns.

"It is further agreed that the parties of the second part shall render all service in their power to secure and furnish such testimony as may be necessary to establish the rights and claims of said party of the first part, in suits pending or to be brought, and without compensation except for necessary expenses incurred by them in this behalf."

The plaintiff sues upon this contract, representing himself and the interests of Samuel H. Davis and Rayl, which he has acquired by assignment.

The suit is brought against the defendants as administrators of George H. Hammond, now deceased, and was tried in the circuit court for the county of Wayne, upon the theory

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that the consideration of Hammond's promise in said agreement was the discontinuance of the suit in the superior court, and the settlement of all claims and demands against Hammond, and the firms with which he was connected, and also the further consideration that Rayl and the Davises would render all service in their power to secure and furnish such testimony as might be necessary to establish the rights and claims of Hammond to the letters patent, and the damages for infringement thereof in said "Boston suit;" that the Davises and Rayl performed their part of the agreement in every respect, and thereby Hammond received the full benefit of the consideration upon which his promise was based; that Hammond settled the "Boston suit," and then permitted it to be dismissed for want of prosecution, whereby, under his said promise and agreement, he became liable to the plaintiff and his assignors for the full sum of $10,000, which he refused to pay.

The question whether or not the "Boston suit" was settled by Hammond was specially submitted to the jury, who found that it was, and brought in a general verdict against the defendants for the sum of $14,258.35, that being the amount of $10,000, with interest from the date of the agreement.

It is claimed that the court below erred in confining the examination of the case by the jury to the question whether or not the "Boston suit" was settled. The contract seems plain enough. The Davises and Rayl had, on the eighteenth day of September, 1880, assigned all their interest in the letters patent to Hammond, and discontinued their suit against him, and acknowledged settlement for all claims and demands against him or any of the firms with which he was connected. He paid them $4,000, and was to further pay them for this assignment and surrender of their claims as follows: In case he succeeded in establishing the validity of the letters patent, the sum of $10,000, or, in case he made a settlement of the

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matters in suit without proceeding to final decree, the same sum; and, in case he recovered any damages, he was to further pay one-sixth of the net amount of such recovery.

The Davises and Rayl were therefore deeply interested in the outcome of the "Boston suit," and it is evident that they intended by this agreement to receive at least $10,000 more for their interest in the letters patent and their claims against Hammond.

They therefore provided against any compromise or settlement between Hammond and the defendants in the "Boston suit" that might stop short of a decree sustaining the validity of their letters patent. In either event of such decree, or a settlement without such a decree, they were entitled by the agreement to $10,000.

The consideration of this agreement was the relinquishment of their claims against Hammond, and their assignment to him of their interest in the patent, and their promise to aid him in the establishment of his claim in the "Boston suit."

The testimony shows beyond question that they were willing and ready to perform this promise, and therefore the consideration was complete.

It is contended by the counsel for the defendants that the true meaning of the contract is that Hammond should make a settlement in a suit which he could have prosecuted to a final decree upon the merits, and that, under the facts shown in reference to the title of the patent, for the infringement of which the "Boston suit" was brought, such suit could not have been successfully prosecuted by Hammond, and he could have voluntarily dismissed it without making himself liable to the payment of the $10,000.

They requested, on behalf of the defendants in the court below, that a verdict be directed against the plaintiff for this reason.

We do not agree with this contention. By the agreement

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a settlement of the case by Hammond, without going to trial, no matter what the condition of his title was, fixed his liability to pay. The contract on his part was to pay the Davises and Rayl a certain sum of money in either one of two contingencies,—the establishment of his right to recover for the infringement in the "Boston suit" by final decree, or a settlement of the matters in controversy by him without suit.

It may be that the condition of his title was such, as received from the Davises and Rayl, that he might have voluntarily discontinued his suit, or submitted to such discontinuance on motion of the defendants in that suit; but if he settled the suit, and then submitted afterwards to the discontinuance, then he was liable under this agreement.

There is not found anywhere in the record any warranty of title to Hammond beyond the promise to furnish all the evidence in their power necessary to establish the rights and claims of Hammond against the defendants in the "Boston suit," and in suits to be brought.

The defendants claim that the title to the patent was so defective that Hammond could not maintain to a successful termination the suit against the Boston parties, and this claim is based on the following facts:

October 14, 1877, David W. Davis assigned to Minna Alpern, of the city of Alpena, Michigan, an undivided half of another patent, and his undivided third interest in the letters patent involved in this case, and assigned to Hammond as heretofore noted. She transferred her interest to Isbell & Merrill of Detroit. As the assignment was first made it was not limited. Each party had a duplicate of the same. But soon thereafter a supplemental contract was made, confining the sale in said assignment to "Alpena, Alpena county, Michigan." This contract, Davis claims, was also executed in duplicate, and to be attached to the original assignments. He attached it to his copy, but Mrs. Alpern did not annex it to her duplicate. She had her copy

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of the assignment recorded in the patent office March 22, 1879, but did not record her duplicate of the supplemental agreement limiting said assignment.

The assignment to Isbell & Merrill was made in November, 1880, and was general, and unlimited as to territory.

March 26, 1881, the Davises, Rayl, and Hammond filed their bill of complaint in the circuit court for the county of Wayne, in chancery, against Minna Alpern and Isbell & Merrill, claiming that the transfer to Minna Alpern was, by the agreement and understanding between her and David W. Davis, confined to her own use exclusively, and included only the sale of the territory within the city of Alpena, Michigan, and that the first assignment was drawn as a general assignment by the mutual mistake of the parties, which was afterwards corrected by the supplemental agreement, that Minna Alpern, at the time of these assignments, was a married woman, and all the negotiations for the sale to her by Davis, and for the sale from her to Isbell & Merrill, were conducted by her husband, Casper Alpern, who signed said agreements in her name, and that he had full power and authority to thus act for her in both instances.

The bill also averred that Isbell & Merrill had full knowledge of all the facts concerning the assignment and supplemental contract between her and Davis before and at the time of the assignment to them, for which they paid nothing, as it was considered of no value.

The bill prayed for the reformation of the assignments, confining them to Alpena county, and an injunction against any transfer or assignment by the defendants of their apparent legal interest in the patents. This bill was supported by the affidavit of Casper Alpern, the husband of Minna, and a temporary injunction was granted as prayed in the bill.

The Davises and Rayl were ready to furnish the testimony to conduct this suit to a successful termination, as well as the

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"Boston suit," but Hammond, for some reason, failed to prosecute either.

March 8, 1882, the following order was entered in the "Boston suit":

"On motion of defendants, the complainants, by their counsel, being present and objecting, this cause is dismissed for want of prosecution, with costs taxed at ———."

There was evidence tending to show, principally by the declaration of Hammond, that the matter was settled before this order was made.

The jury found this to be so, and we are not disposed to hold that there were not sufficient evidence and circumstances in the case to warrant such finding.

It is claimed by the counsel for the defendants that the counsel for the defendants in the "Boston suit" became aware of this defect in the title of Hammond; that this assignment of Davis' interest to Minna Alpern was a perfect defense to Hammond's claim in that suit. If this be conceded, still, if Hammond settled the suit with them, he is liable under his contract.

It is further claimed that there was no evidence of such settlement sufficient to be submitted to the jury.

We think differently. The record shows that the "Boston suit" was dropped, or settled, as the case may be, by Hammond without any consultation with Davis, or any notice to him. It was concealed from him until he learned it from other parties. The testimony also tends to show that Hammond had the control and management of the suit against Alpern and Isbell & Merrill, and that said cause was settled and dismissed by stipulation, without costs, December 8, 1882, just nine months after the discontinuance of the "Boston suit." Hammond and his successors have been conducting the business ever since of using this patent, and took no steps afterwards against the defendants to these suits. Ham-

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mond told one witness that he had settled the "Boston suit," and settled it satisfactorily. Several others testified to his saying that it was settled, but that was all he said.

The testimony of these last witnesses has but little weight standing alone, as he might make such a remark if he had voluntarily abandoned the suit, or been forced to do so; but, taken in connection with the testimony that he said it was settled satisfactorily, and also the evidence of another witness that Hammond said to Samuel H. Davis that he had "compromised" the suit, and that he would make the $10,000 "contract or note" satisfactory with him and Rayl, "but he didn't care to have D. W. insult him any more about this thing at his office," it had a tendency to support the claim that the suit had been settled by Hammond to his satisfaction.

The testimony of these witnesses, the plaintiff, under the statute, being precluded from testifying in relation to what Hammond said about it, and the circumstances of the discontinuance of these suits, with the full benefit of these letters patent left in the hands and enjoyment of Hammond, were sufficient to warrant the jury in finding that there was a settlement of the "Boston suit."

It certainly was the duty of Hammond to push his suit against the Boston parties to decree or defeat, or, if he was satisfied he could not successfully maintain his suit because of the fault of Davis in not conveying to him a perfect title, it was his duty to acquaint Davis of this fact, and to repudiate his agreement with him because of such defective title. He could not, without any complaint or notice to Davis, settle the matter with the Boston parties, "compromise" the matter with them "satisfactorily" to himself, and then, after he had accomplished the purpose of his suit, say to Davis, in effect:

"It is true I have settled this suit to my satisfaction, but I am not obliged to perform my agreement with you, because I did not obtain a perfect title from you."

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The court was right in submitting the case solely upon the question of settlement. There was no dispute about any other material fact. This question was fairly submitted. The jury were told that the "Boston suit," as appeared by the court records, was dropped or discontinued for want of prosecution; that this did not indicate a settlement, nor did it indicate that there was not a settlement,—it merely indicated that the suit was dropped; that the burden of proof was upon the plaintiff, and he must show, by a preponderance of testimony, that the suit was settled before he could recover.

From the whole record I am satisfied that the suit in Boston was not discontinued or allowed to be dismissed because of any fault or imperfection in the title conveyed to Hammond, but for the reason that Hammond had made a satisfactory compromise with the defendants Swift and Jewett in that suit. Their testimony, for some reason, was not taken in this cause, but enough appears to show that since the discontinuance of the suit there has been no conflict between them and Hammond, or those succeeding to his rights. The title held by Isbell & Merrill does not trouble any more after the suit against them and Mrs. Alpern is "settled and dismissed by stipulation." It would appear from all the facts and circumstances in the case that the full benefits of this patent have been enjoyed by Hammond since the settlement was made, and, under my view of the case, the $10,000 was rightly adjudged to Davis, as there were no errors in the admission or rejection of testimony.

The judgment is affirmed, with costs.

SHERWOOD, C. J., and LONG, J., concurred with MORSE, J.

CAMPBELL, J. As the argument in this case took a rather wider range than was authorized by the record, it is necessary to refer to the precise character of the controversy, as laid before us by the only means of information we legally possess.

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The suit in which plaintiff prevailed below was for the alleged breach of a contract whereby the late George H. Hammond bound himself in a certain contingency to pay the assignors of plaintiff $10,000, and certain other possible profits.

The declaration contains two counts, which differ from each other in no important respect, except that the first declares for a breach arising out of the discontinuance of a suit in Boston, and the other for a settlement of the same suit before discontinuance. These are the breaches alleged, and no other.

The contract, dated September 18, 1880, which was set forth in its exact words in the declaration, in which Hammond was party of the first part, and David W. Davis, Thomas B. Rayl, and Samuel H. Davis were parties of the second part, recites that Hammond was assignee and owner of a certain patent right, which was issued by the United States to William W. Davis, Samuel H. Davis, and David W. Davis, and was also assignee of the right to recover for damages previous to the assignment of the patent to him, and that he had begun a suit in equity in the United States court in Massachusetts to recover damages for infringement, and to establish the validity of the patent, and had employed counsel for the purpose, and proposed and intended to have said action prosecuted with all reasonable speed and dispatch. The contract then proceeded in this way:

"Now, in case it shall be decreed by said circuit court that the said letters patent, so granted on the sixteenth day of June, 1868, and reissued on the fifteenth day of September, 1868, as above set forth, are valid; then, upon such final decree being rendered in said circuit court sustaining the validity of said patent upon the third and fourth claims thereunder, and without reference to exceptions or appeal to or from the decree or judgment of said court to the Supreme Court of the United States, or in case said first party shall make a settlement of the matters in said suit without proceeding to final decree, the said party of the first part shall

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pay to the parties of the second part, their executors, administrators, or assigns, the full sum of ten thousand dollars for the use and benefit of themselves, or their representatives or assigns.

"It is further agreed that the parties of the second part shall render all service in their power to secure and furnish such testimony as may be necessary to establish the rights and claims of said party of the first part, in suits pending or to be brought, and without compensation except for necessary expenses incurred by them in this behalf.

"And said Hammond further agrees that from the amount so recovered by him for damages in said suit shall be paid all the expenses and costs of such suit for the recovery of damages, including counsel fees and all expenses of litigation, and, after such deduction of costs and expenses, the said Hammond shall pay to the parties of the second part one-sixth of the net amount of the recovery, so far as the recovery is for damages on account of the use of said invention for the purpose of transportation."

Plaintiff is averred to be assignee of this contract, which is not disputed. After averring readiness to furnish testimony, as agreed, the breach alleged against Hammond is that he—

"Willfully and carelessly neglected and refused to prosecute said suit in equity with all reasonable speed and dispatch, and hath hitherto wholly neglected and refused, and still does neglect and refuse, to prosecute said suit, although often requested so to do, but, on the contrary thereof, he, the said defendant, hath allowed said suit to be dismissed for want of prosecution."

The second count sets up the same breach, but states in addition that the said George H. Hammond had, in fact, before said suit was dismissed, made a settlement of the matters in said suit.

Upon the trial it appeared that, as a part of the transaction, and on the same day the agreement sued on was dated, an assignment was made by Samuel H. Davis and Thomas B. Rayl, whereby they assigned to Hammond the entire patent interest, and the right to collect damages for all previous infringements, and covenanted and agreed—

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"That at the execution and delivery of this instrument they are the lawful owners and holders of said invention, as secured by said letters patent, and of every interest and right therein, except such licenses as have been given for the use thereof for stationary boxes not used for transportation, and such rights as have been granted to said Hammond and Ives as hereinbefore stated, and that they have good right and authority to make such conveyance."

It appears, therefore, that the whole arrangement was that, in consideration that Hammond received from the plaintiff's assignors an absolute and complete legal title to the patent in question, which would enable him to successfully proceed against any infringers, if the patent itself was valid, and which would therefore enable him to prosecute the Boston suit successfully against the defendants in it if the patent should not be ineffectual and if they were guilty, Hammond would pursue that suit to a termination, and would pay the sum of $10,000 and a share of the net damages if the patent was held valid in the circuit court, or if he settled the suit before decree he should pay the $10,000.

The declaration follows this idea strictly, and charges a voluntary dismissal of the suit, and a settlement under which that dismissal was had or permitted. The charge of the court shut out from the consideration of the jury everything but the one fact of a settlement of that suit, and would allow no other inquiry.

It is only by disregarding the real issue made under the declaration, as well as the facts on which there was no dispute, or on which testimony was rejected by the circuit judge, that the charge and the rulings below can be maintained at all.

The judge confined the jury to the second count of the declaration, and told them they must only inquire whether there was "a settlement of the Boston suit." He told them it appeared from the evidence that the Boston suit was discontinued for want of prosecution; that the discontinuance only indicated that the suit was dropped, and that they must

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inquire whether there was a settlement. The only question submitted to them specially was in this form: "Was there a settlement of the Boston suit?" This was answered affirmatively.

The court refused a series of charges on facts which were beyond controversy, to the effect that the undisputed testimony showed that one-third of the legal title of the patent had previously been conveyed to one Minna Alpern, who held it when the agreement was made; that Mr. Hammond had no such title as would enable him to prosecute the Boston suit successfully; that the consideration was not proved as alleged; and some other points not in our judgment necessary now to consider.

All of the testimony introduced to prove a settlement consisted of various statements of Hammond proved by witnesses, some of which had a tendency to show that he stated the suit or matter was settled. There was no testimony having any tendency to show that Hammond admitted that the suit was discontinued after such a settlement, or in consequence of it.

Neither was there any proof of the nature of such a settlement, or with whom it was made.

By the agreement on which Mr. Hammond was sued in this cause it was contemplated that there should be no obstacle for want of title in him to sue. The other parties covenanted that his title was perfect, and agreed to furnish all necessary testimony. He agreed to bear all the expenses, which were only to be repaid out of the proceeds of the suit; and, if he had been vested with the title, there could never have been any need of resorting to another suit, and he would have been saved all the expenses that were lost. Both the declaration and the charge go upon the theory that this Boston suit was the sole subject of agreement, which was discontinued by his voluntary act after settlement.

It became, therefore, a vital question whether the suit was

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one which they had given him the means of maintaining, and which dropped because he chose under some settlement to drop it.

The court below practically told the jury that the suit was dropped and discontinued, and only left it to them to say whether it had been settled; and, as no settlement was declared on except one in advance of the discontinuance, this is the only thing that could have been of any consequence, or which defendants could have been called on to meet.

But the record, and the only evidence in the case on the way the suit was ended, shows that it was not discontinued at all, but was dismissed on argument, and against Hammond's objection, for want of prosecution. The testimony further showed conclusively that he had no such title as would, under the patent laws, allow him to prevail in such a suit, and that the reason why he had no such title was that the parties represented by plaintiff, with whom he made the agreement sued on here, had themselves divested their own title, and did not and could not convey it to him, and that he must necessarily be defeated in that proceeding. Had the jury been properly informed that there was no suit in Boston that he could have sustained, and that he was prevented by plaintiff's default from doing so, they could not possibly have found as they did. The consideration for the agreement utterly failed, and there was no breach of the undertaking shown.

Furthermore, the court below throughout used the word "discontinuance," which is a word that has no application to anything but a voluntary ending of a suit. The record, as already suggested, showed an involuntary and hostile ending. But the court below, in addition to this, refused to allow the admission of evidence to show that the defendants in the Boston suit, who had found out Hammond's want of title, gave repeated notices to Hammond's counsel to proceed in the cause, or that a dismissal would be moved for want of

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prosecution, and that the dismissal actually had was so produced, as it so appeared of record. It was going a good way to place any stress on such loose and contradictory statements of what Hammond said, with nothing to show when or how a settlement was made. But it was certainly open to defendants to show that no settlement was made at all under which the suit came to an end, and that Hammond was put out of court unwillingly, because, by reason of plaintiff's assignors' own default, he had no possible standing in court.

The judgment below cannot be sustained on the pleadings and proofs, and the court should, as requested, have ordered judgment for defendants. But the same class of errors will be found throughout to have arisen from a departure from the record, and a failure to recognize the true state of the title and the respective rights of the parties.

In our view the judgment should be reversed.

CHAMPLIN, J., concurred with CAMPBELL, J.

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BENJAMIN W. WHITE v. WILLIAM CLEAVER.

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Equity—Sale of real estate by co-tenant—Accounting—Statute of frauds.

1. Complainant and defendant agreed in writing with one Owen that he should furnish the money with which to purchase a tract of land, he to receive a conveyance of one-half and the complainant and defendant the other half of the land. Before the deed was executed, the defendant, acting for himself and complainant, made a sale of their interest to Owen, and, relying upon defendant's statement of the amount received on the sale, complainant transferred his interest to Owen. He afterwards learned that defendant received a much larger sum, for which he refused to account to complainant, but invested a portion of the money in other land, and refused to recognize complainant's rights, legal or equitable, in the premises, or to pay over the money received on such sale.

   Held, that a bill charging these facts makes a case involving the consideration of trust relations, and, fraudulent conduct upon the part of the defendant being averred, the court has jurisdiction; and, on the facts stated, it cannot be said that the remedy at law is adequate.

2. A parol agreement by one tenant in common of land for its sale by his co-tenant in the joint interest, which has been fully executed, and the interest of such tenant converted into money and received by the co-tenant, is not within the statute of frauds.

Appeal from Tuscola. (Beach, J.) Argued January 24, 1889. Decided June 7, 1889.

Bill for an accounting and other relief. Decree overruling general demurrer affirmed, and defendant given 30 days in which to answer. The facts are stated in the opinion.

T. W. Atwood (*Wixson & Quinn*, of counsel), for complainant.

George W. Davis, for defendant.

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SHERWOOD, C. J. The complainant in this case seeks to obtain an accounting with defendant, in which he claims a large amount of money will be found to be due to complainant, and which accounting the defendant refuses to make, or to pay the moneys claimed to be due.

A general demurrer is interposed to the bill by the defendant, and unless the bill is entirely wanting in equity the demurrer must be overruled.

The facts set up in the bill are substantially as follows:

The defendant is son-in-law of complainant, and resides in Caro, Michigan, as does also complainant. In the month of June, 1886, the Crawford estate owned a quantity of timbered lands in Huron county, which were offered for sale, as the parties believed, at reasonable prices, and they entered into a verbal agreement between themselves that they would purchase the lands together, each to pay one-half the purchase price, bear equally the expenses in making the necessary investigation and estimates preparatory to making the purchase, and share equally in the profits, after paying such costs and expenses, when sales were made.

In pursuance of this arrangement the said Cleaver incurred large expense in making the examinations and estimates, and when ready to purchase, not being able to make the purchase for want of means, it was further agreed between the parties that they should take in a third party in the venture, who could furnish the means, and that they should still share equally in the profits that should be received by them.

In September following they agreed with John Owen, of Saginaw, to furnish the money to make purchase of the lands to the amount of about $35,000; that Owen should receive the title to one-half of the lands purchased, and White and Cleaver title to the other half; that Owen should be secured by the parties for the purchase price of one-half of the lands, with reasonable interest thereon until paid, and Owen was to have one-half of all of the profit resulting from the purchase

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of the lands, and White and Cleaver the other half. The estimating of the timber was to be paid for by all three of the parties, Owen to pay the half thereof.

This agreement with Owen was put in writing on the first day of October, 1886, and the contract for the purchase of the lands was subsequently made.

After this, and before the conveyance of said lands was executed, Owen proposed to buy the interest of White and Cleaver in said lands, and Cleaver was intrusted with the business of selling said interest to Owen by White, and did so sell the same to Owen, as Cleaver claimed, for the sum of $4,000, less the portion of expenses of estimating the timber which they were to pay.

The bill then further avers that complainant relied upon the statement made by Cleaver as to the amount he received on sale of their interest to Owen when he executed the transfer of his interest in the lands to Owen, and believed the amount Cleaver represented Owen had agreed to pay therefor was all that defendant received therefor, whereas, in truth and in fact, he is now informed and believes that Cleaver actually received over $7,000 for such interest of Owen, and has refused to account for the same to complainant; that said Cleaver has invested $1,800 of complainant's money in a lot in Caro, and refuses to recognize complainant's rights, either legal or equitable, in the premises, or to pay to him the moneys so received of Owen.

Complainant further avers that Cleaver received the money of Owen in trust for complainant, and, to the extent that Cleaver invested the trust fund in the real estate mentioned, he holds the title thereto equitably incumbered therewith, and asks that the court may so decree and enforce the same against said lot.

It is claimed on the part of the defense that complainant has a perfect remedy at law.

The circuit judge overruled the demurrer. I think this

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was right. Trust relations were to be considered, and fraudulent conduct on the part of the defendant is averred in the bill, and these give the court jurisdiction, and under the facts stated this Court cannot say the remedy at law was adequate.

The case is not one within the statute of frauds. As against the defendant, the claim which the complainant makes is one originating under a written contract between them, supported by a sufficient consideration, and, so far as a parol agreement was made, it has been fully executed, and the complainant's interest thereunder has been converted into money, which was held in trust by defendant for him until the defendant invested in the real estate mentioned.

It would be a misuse of that statute to so apply it to these facts as to defeat the equity, which is now the effort of the defendant, as shown by the bill.

The decree should be affirmed, with costs; but the defendant will be allowed thirty days in which to answer the complainant's bill.

The other Justices concurred.

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THE PEOPLE v. JAMES STEWART.

Criminal law—Statements of respondent—Reasonable doubt—Circumstantial evidence—Charge to jury.

1. *Prejudicial* statements or admissions made by a prisoner at a time and under circumstances well calculated to disturb his judgment and prudent action, and to unduly excite his fears, even if innocent, which conditions are the *natural* effect of the course pursued by the officers in charge, are not admissible as evidence against him.
2. *Held*, that respondent's first, second, and third requests should have been given, for reasons stated in the opinion.
3. On the trial of a respondent for murder, it is competent for the people to show where he went after he had testified before the coroner's jury, and before his arrest.
4. In the absence of direct proof of the cause of death in a homicide case, if such fact can be accounted for upon any reasonable theory other than that of the respondent's guilt, the jury should acquit.

Error to Lenawee. (Lane, J.) Argued January 29, 1889. Decided June 7, 1889.

Respondent was convicted of murder. Judgment reversed, and prisoner admitted to bail in the sum of $1,000. The facts are stated in the opinion.

Grant Fellows, for respondent.

D. B. Morgan, prosecuting attorney, for the People.

SHERWOOD, C. J. The respondent in this case was charged with the murder of James Hall, and was tried for that crime in the Lenawee circuit court at the November term, 1887, and the jury disagreed. He was again tried at the February term, 1888, and convicted of murder in the second degree, and sentenced to imprisonment at Jackson for the period of eight years.

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The respondent asks for a review in this Court of the proceedings under which he was convicted.

The record includes a bill of exceptions containing all the testimony, and which shows the conviction was had upon circumstantial evidence. In many of its features the case is a peculiar one.

It appears that on the third day of October, 1887, Hall came to the village of Hudson, and was seeking work upon a railroad then being constructed through the village. In the evening of that day he visited several saloons and restaurants, and became intoxicated. He spent some money at several of these places; and, while he claimed to have plenty of money, very little was exhibited.

Hall engaged lodgings for the night at the Rodney House, and paid, in advance for the same, 25 cents. Mr. Witherell was proprietor. He then wandered about the village in the afternoon, smoking and drinking at saloons; and a portion of the time in the evening he was followed by two boys by the name of Cosgrove and Moriarty. They were about 17 years old. Moriarty first saw Hall in the evening about 7 o'clock near Montgomery's saloon,—passed him on the walk; and next saw him at the corner of Main and Market streets near Mr. Lawrence's store. Cosgrove was with him. They all went into the Rodney House. This was about 10 o'clock at night. Hall was so drunk then that Mr. Witherell did not want to keep him over night, and paid him back his money he had advanced for his lodging, and directed him up through an alley near the Rodney House, and there he went into a shed. He was driven out of this place by a Mr. Spalding, who led him out on Market street. The boys then followed him, and, when he got along near Lawrence's corners, the two boys were met by the respondent, and the three went down near where Hall then was, and followed him. He went staggering along, and when they caught up with him Stewart told him he was the marshal, and took hold of him,

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and one of the boys took hold of his hand, and turned him back the other way, which he continued until they got to the corner, where they claim Stewart told him he was not an officer, and was only fooling with him. They then went with him up through an alley about 15 rods to an old building in the rear of a furniture store. The building was about 12 feet square, and contained some bed slats and shavings, or excelsior, from which Moriarty and Stewart prepared a place for Hall to lie down upon, and he went in and laid down. The three claim that they then left him for the night with the door to the building or shed open, and never saw him again alive.

Between one and two o'clock the shed was discovered to be on fire; and upon an examination of the premises, as soon as it could be done, it was discovered that the dead body of Hall was among the *debris*, charred and disfigured by the fire.

The *post mortem* examination disclosed that, when the body was found, it laid upon the right side with a hole in the left temple made by some blunt instrument. The fracture in the skull was an inch and a half wide, by two inches long. By the side of the body when discovered laid an iron bar, the end of which compared favorably with the wound in the head. It was a bar that was kept in the shed, and was in there the night before. The physicians swore that the wound might have been made in the head in various ways.

At the time of the fire, Moriarty lived with his parents in the town of Wright, in Hillsdale county, but was then stopping in Hudson, and at work on a railroad.

Cosgrove then lived in Hudson, and was a clerk in a drug-store.

The respondent, when charged with the crime of killing Hall, protested his innocence, and has always asserted it.

The foregoing facts, with some contradictory statements alleged to have been made by Stewart to the officers and

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others, were the evidence principally relied upon for conviction by the prosecution.

It is a little difficult, from the record or briefs in the case, to ascertain the theory of counsel for the people, beyond that the respondent was the last person seen with Hall before he died, and that the former had the opportunity to commit the crime charged.

It is not shown that respondent had any ill will towards Hall when alive, or that Hall was in the possession of money, or had anything else that Stewart wanted, or that would furnish a motive for the killing. It would appear to be claimed that, not only did the respondent do the killing, but subsequently set the building or shed on fire. There may be some question whether the court should not have directed the verdict in the case. We, however, inasmuch as there has been a verdict against the respondent, will consider the case as presented by the record, assuming it was a proper one for the jury to pass upon.

We think the fact that the homicide was committed in Lenawee county was sufficiently proved, and no error was committed in so ruling.

Charles M. Croswell was reporter for the Adrian Times, and had a conversation with the respondent at the Lake Shore depot in Adrian while he was in the officer's custody.

The same officer had arrested the respondent, and had several previous talks with him in regard to the homicide, and Stewart's connection with it. When respondent was brought before the magistrate, the officer, who was a deputy-sheriff, said to him:

"Now, Jimmie [meaning Stewart], you have been lying to me. * * * I do not want you to open your mouth unless you tell me the truth; do not say anything."

The officer testified that Stewart made the remark, twice:

"I did not strike the blow."

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Mr. Carson, who was the justice who issued the warrant for respondent's arrest, was present at this conversation between the deputy-sheriff and respondent, and states, also, that the deputy told the respondent he had better tell the truth; that it would be better for him, or words to that effect; that Stewart made no statement until the officers asked for it.

"They told him they knew that he had been lying; that they had got evidence that he had been lying to them; that they had ascertained that he had lied as to his whereabouts in accounting for himself during certain hours of the night of the fire; and that he had better tell the truth; that it would be better for him."

That at this time there was an officer upon each side of him; and then they said to him:

"We know you have been lying to us now; we do not want you to lie any more. * * * If you cannot tell the truth, keep your mouth closed."

That he then said:

"I have told you."

That one of the officers said:

"No, you have not told us the truth; we know better. * * * We have seen your mother, and Mrs. De Long's testimony contradicts it. You said that you were at your mother's; that you were in bed at your mother's that evening."

That Mr. Stewart immediately spoke up, and said:

"I did not say I was to bed. I merely said I was there."

That the officers then said to him:

"We do not want any more of that. We want you to tell us, and connect yourself through from the beginning to the end with the transaction,—all you know about it."

That respondent then said:

"Well, if you send me up for ninety-nine years, I did not kill the man. * * * I did not strike the blow."

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It further appears that, at the time of the conversation with the reporter, respondent did not know him, or that he intended to use it against him, or that he was a reporter, but respondent supposed him to be a lawyer. Respondent had neither employed nor consulted with a lawyer at that time.

The conversation related to the transaction, and what respondent knew about it, and what part he took in the evening's proceedings when the alleged homicide occurred; and, to that end, the counsel for the people asked the witness to state what the conversation was.

Counsel for respondent made the following objection to the question:

"I object to that as incompetent. There is no showing that the statement was voluntary; and I believe the people must show that the statement was voluntary, and that no inducement had been offered either at this time or at any prior time.

"The burden is upon them to show that the statement was voluntary. If any inducement has been offered at any prior time, they must show that the effect of this inducement has been wiped out, either by statements to the prisoner that it could not be used against him, or by something else.

"My position is that, from the time the defendant was arrested until this statement was made, there must be proof that no statement was made to him which would render his statement involuntary."

It is true the witness stated there was no inducement held out by him to respondent to make the statement; that nothing was said to him as to whether he ought to make a statement or not; and that witness did not know what the officer had said to the respondent. The witness was then permitted to state what the respondent there said to him while in the custody of the officers, and under their control, and after the conversation had with them as hereinbefore narrated, and against the objection of respondent's counsel.

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Similar statements were allowed to be given in evidence by the justice later on in the case, and afterwards, on motion of defendant, were stricken out, on the ground that only such portions of the statements were allowed to be made as suited the officers, and, when any others were attempted to be made by the respondent, he was told he lied, or that he must stop that kind of talk.

The respondent's counsel, at the time this ruling was made, again called the attention of the court to the statements given in evidence by witness Croswell, and asked to have them stricken out.

We think the objection to the admission of Croswell's testimony was well taken, and that the motion subsequently to strike it out should have been granted. They were made at a time and under circumstances which were well calculated to greatly disturb the judgment and prudent action of the respondent, and to unduly excite his fears, even if innocent; and such feelings were but the natural effect of the course pursued by the officers having him in charge. And the effect of what they did and said and induced the prisoner to say was to his prejudice before the jury. It is, indeed, quite manifest that without this testimony a conviction could not have been obtained, and the court erroneously admitted it.

Several requests had been prepared by the respondent's counsel for the court to charge, and the court was asked to give them to the jury. This was not done. These requests were as follows:

"1. You will start out in the trial of this case with the presumption that the defendant is wholly innocent of the crime charged, and that presumption must be overcome by evidence so convincing that you can say, beyond any reasonable doubt, that the defendant is guilty as charged.

"2. A reasonable doubt is such a doubt arising out of the evidence that you cannot say, to a moral certainty, that the defendant is guilty; and, if there is any other reasonable

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explanation of the death of the stranger than the guilt of the defendant, you are bound to acquit.

"3. The prosecution claim that the evidence in this case is made up of a chain of circumstances of facts or links so connected together that they lead up, with all reasonable certainty, to the defendant's guilt. And, gentlemen, I charge you that, in order to convict the defendant upon that class of evidence, you must be satisfied, beyond any reasonable doubt, that each material fact or necessary link in the chain has been proven; and, if you have any reasonable doubt about any one of the necessary facts or links constituting the chain of circumstances, then you should acquit the defendant.

"To illustrate: The first material fact or link is the death; the second, death by violence at the hand of some person. The first fact, the death, is not disputed; the second is contested; and, if you have any reasonable doubt as to either one of them, then you must acquit.

"4. It is claimed by the prosecution that the defendant has made different and contradictory and inconsistent statements concerning his whereabouts for one or two hours immediately before the fire in question. But, even if defendant did make such contradictory statements, and they were partly or wholly false, that of itself would not be sufficient to convict the defendant. And you should very carefully consider what the average young men of his condition of life might do under like trying circumstances; and in this connection you should recall the fact that the young men Cosgrove and Moriarty were both quickly ready to resort to falsehood for the purpose of warding away suspicion notwithstanding their acknowledged innocence. And now, gentlemen, if you should believe that this defendant made contradictory statements, and that some of them, or all of them, were false, it will not be unnatural that such belief on your part may create a prejudice in your minds against this defendant.

"If such should be the case, it will be your duty to exercise great care that you do not permit that prejudice to take the place of and be substituted in your minds for actual evidence and proof of all the necessary and material facts to constitute the chain necessary to establish the defendant's guilt.

"5. As I have said, it is not disputed in this case but that the deceased stranger met his death in the shed in question on the night of the third, or early morning of the fourth, of October last, but the difficult question is, how did he come by his death? Can it be accounted for upon any reasonable

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theory other than that he was murdered by this defendant? If it can, then you must acquit the defendant."

We do not think the fourth assignment is well founded. It was sought to show where respondent went, and his conduct, after the coroner's jury had been summoned and he had been examined, before his arrest on the same day, and it was permitted to the people to do so. We see nothing objectionable in the examination.

The defendant's sixth, seventh, and eighth assignments of error involve the refusal to give the defendant's first, second, and third requests to charge. It may be said that they were given in substance with much plausibility. Still, they were not given in the language requested, and there was no reason why they should not have been.

It not unfrequently occurs that, in consequence of the peculiarity of some of the jurors, known to the counsel, he can tell best what particular form of expression will be best understood by them. This is especially the case where counsel are well acquainted with the jurors, and know their peculiarities of thought, and mode of reasoning and ability to comprehend; and, in a case like the present, where so much depends upon the charge of the court, and the manner in which the charge is given, we think, as we have often said before, the court should give the requests of counsel in the language of counsel, if found correct; and, while it is quite possible the judgment here should not be reversed for these alleged errors, these requests should have been given as requested. *Cook v. Brown*, 62 Mich. 473 (29 N. W. Rep. 46); *Mynning v. Railroad Co.*, 59 Id. 257 (26 N. W. Rep. 514); *People v. Macard*, 72 Mich. ——— (40 N. W. Rep. 787).

If this may not be required of the court, the rule that counsel may prepare and make such request to charge is of but little or no benefit to the respondent, or in fact to either party in any suit tried by jury.

We think the respondent's fourth request was correctly

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refused. It requires the court to pass upon facts which were exclusively for the jury.

The fifth request should have been given, for the reasons already mentioned.

The other questions presented are unimportant, but for the errors noted the judgment must be reversed, and a new trial granted.

With the errors in this record eliminated, a conviction would be highly improbable. But what new facts may have been disclosed since the case was tried, if any, we have no means of knowing; and in any event, if it is thought best to longer hold the respondent for trial, he must be admitted to bail on giving bond for his appearance in the sum of $1,000, to be approved by the circuit judge, with two good and sufficient sureties.

The other Justices concurred.

THE PEOPLE v. JOHN S. MORRISON.

Bastardy proceedings—Recognizance—Liability of surety.

The liability of a surety on a recognizance for the appearance and answer of a respondent charged with bastardy cannot exceed that of his principal.

Error to Houghton. (Williams, J.) Argued January 29, 1889. Decided June 7, 1889.

Debt on recognizance in bastardy case. Defendant brings error. Reversed. The facts are stated in the opinion.

T. L. Chadbourne (*Allen F. Rees*, of counsel), for appellant.

Thomas B. Dunstan, prosecuting attorney, for the People.

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SHERWOOD, C. J. The people in this case bring an action of debt on a recognizance, signed by defendant as surety for his principal's appearance before the circuit court for the county of Houghton, to answer to the charge of bastardy, upon which respondent had been bound over by a justice of the peace.

The proceedings were taken under chapter 53, How. Stat. § 2005, which provides that the magistrate may require the respondent—

"To enter into recognizance with one or more sureties to the satisfaction of the justice, in such sum as he may deem necessary, not less than one hundred nor more than five hundred dollars, upon condition to appear and answer to the said complaint at the next term of the circuit court for the county," etc.

The respondent and the defendant severally and respectively acknowledged themselves indebted to the people in and by the recognizance; the former in the sum of $100, and the latter in the sum of $300, to be levied in case of default, etc.

There is no dispute but that the proceedings before the justice were all regular, and that the recognizance was duly forfeited according to law, and that before the bringing of this suit the defendant paid to the clerk of the county, for the use of the superintendents of the poor, the sum of $100 on said recognizance; and he now claims that the extent of the liability of the respondent was or should be the extent of his liability, and that, he having discharged that, this suit ought not to be maintained against him.

The circuit judge held otherwise, and entered judgment against defendant for the sum of $200.

We think the learned circuit judge erred.

It will be noticed that the statute requires that the respondent shall enter into the recognizance in such sum as the justice may require, from $100 to $500, for his appearance at the circuit to answer the complaint and abide the

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order of the court, and he must also furnish one or more sureties to his recognizance that he will do this.

Now, if the respondent fails to perform the conditions of his recognizance, he is required to pay $100, and that discharges his pecuniary liability for such default upon the recognizance. It was this undertaking of the respondent that the defendant became responsible for, and, when the defendant discharged the liability of respondent by payment of the amount required of the latter, he performed all he obligated himself to do, and no right of action remained to the people against him.

The judgment should be reversed, and, as the people show no right of action against the defendant, a new trial will not be granted.

The other Justices concurred.

CHARLES WEBER v. WILLIAM STAGRAY AND PETER VAN ERP.

Trespass—Notice of title—Highways—Discontinuance—Certiorari—Appeal to township board—Jurisdiction—Damages to land-owner.

1. A notice of title in an action of trespass to lands in justice's court, which states that the land on which the injuries complained of were committed was a legal highway, and that defendant in removing the fence of the plaintiff was acting as highway commissioner under the statute, but which does not describe *all* of the land claimed to have been trespassed upon, is sufficient to apprise the plaintiff of the nature of the defense, and under which all pertinent testimony may be admitted.
2. *Void* proceedings by a commissioner *discontinuing* a highway are not a bar to regular ones taken to widen it to the statutory width; which latter action is not *premature* by reason of the pendency of *certiorari* proceedings, in which the invalidity of such discontinuance proceedings is established.

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3. An appeal to the township board from proceedings to lay out or alter a highway is a waiver of such defects and irregularities as do not show a want of jurisdiction or that the proceedings were void.[1]

4. Damages to the value of the land for farming purposes, taken by a commissioner of highways in laying out or altering a highway, must be allowed to the owner before the public can acquire any rights or interest in the property condemned

Error to Bay. (Cobb, J.) Argued February 12, 1889. Decided June 7, 1889.

Trespass. Defendants bring error. Affirmed. The facts are stated in the opinion.

T. A. E. & J. C. Weadock, for appellants.

Lindner, Porter & Haffey, for plaintiff.

SHERWOOD, C. J. The plaintiff brought his action in justice's court to recover damages for trespass upon his lands, aggravated by the removal of his fences.

Under a plea of title the defendants, claiming that the *locus in quo* was a public highway, caused the suit to be removed into the circuit court for the county of Bay, where it was tried, and Judge Cobb directed the jury to find for the plaintiff, and allowed them to assess the damages. They did so, and judgment was entered accordingly.

The defendants bring error.

The highway was originally established by user, and the defendants claim that the land upon which the trespass was committed was taken under regular proceedings for the purpose of altering the highway by making it of the lawful width, and that in removing the plaintiff's fence therefrom they acted under a proper order from the commissioner of highways.

[1] See *Soller v. Township Board of Brown*, 67 Mich. 422 (head-note 2), and notes.

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The proceedings under which the defendants claim to make their defense are authorized by chapter 29, How. Stat. §§ 1296–1304. They were taken for the purpose of altering the road, and condemning plaintiff's land for that purpose, by the defendant Stagray, as commissioner of highways of the township; and, while the alteration was made and determined by him, he did not allow the plaintiff any damages for the land taken.

An appeal was taken to the township board from the determination of the commissioner, which was dismissed, thus leaving the matter of the alteration as the commissioner had determined it. No *certiorari* has ever been taken from his proceedings.

At the proper time the statutory notice to plaintiff was given by the defendant commissioner to remove his fences from the highway as thus altered and laid. Plaintiff refused to comply, and the commissioner, Stagray, and the other defendant, removed them for him, under How. Stat. § 1313. It is in removing such fences that the trespass is alleged by plaintiff to have been committed.

On the part of the plaintiff it is claimed:

1. That the strip of land described in defendants' plea of title does not include all of the land condemned and taken, and upon which the alleged trespass was committed.

The notice, we think, however, is sufficient to apprise the party of the nature of the defense, and to allow all testimony offered and admitted pertinent to the subject and issue.

2. Plaintiff insists that the action of the commissioner was premature, irregular, and therefore void, and plaintiff therefore had the right to maintain this suit, and ought to be allowed to recover.

Mr. Stagray had previously, as commissioner of highways, entertained proceedings taken for the purpose of discontinuing said highway altogether, and made his determination so to do. From this determination one Price, who was inter-

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ested, removed the proceedings by *certiorari* into this Court and they were held to be void, and were quashed.

Certainly they could have no effect whatever upon this case or the proceedings herein set up as a defense, inasmuch as they were void. See *Price v. Stagray*, 68 Mich.——(35 N. W. Rep. 815).

The proceedings before the commissioner were not premature on account of the pendency of said *certiorari* to review such void action before then taken. *Names v. Commissioners of Highways of Olive and Robinson*, 30 Mich. 490; *Prescott v. Patterson*, 44 Id. 525 (7 N. W. Rep. 237).

In further consideration of plaintiff's two points, other things are to be noticed. This case is not *certiorari* to review the action of the commissioner in making the alteration in the highway necessitating the taking of plaintiff's land and removing his fences, where all of the questions involving the regularity of all of the proceedings could be inquired into, but error to review the proceedings in a case where the proceedings before the commissioner in altering the highway came only collaterally in question, and in which an appeal was taken therefrom; and where an appeal has been taken to the township board from *such* proceedings the statute (How. Stat. § 1303) expressly says "their decision shall be conclusive and final."

It is also held by this Court, in *Prescott v. Patterson*, 44 Mich. 525 (7 N. W. Rep. 237), that an appeal to the town board in such a case is a waiver of previous defects and irregularities, but this rule does not apply to such defects as show a want of jurisdiction or that the proceedings are void.

It is to be further noticed under this point that the record does not purport to give all of the testimony in the case, but, so far as the proceedings taken before the commissioner do appear, they are regular, including the notice to remove fences and open the highway.

But it nowhere appears that the commissioner or the town

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board allowed the plaintiff any damages for his land taken for the use of the street. This must appear, or the proceedings will be void.

Damages to the amount of the value of the land taken, for farming purposes, must be allowed to the owner by the commissioner before the public can acquire any rights or interest in the property condemned. This was, in the present case, precedent to the right of the commissioner to enter upon the plaintiff's land for any purpose, and the acts of the defendants cannot therefore be justified under the commissioner's proceedings, and the judgment must therefore be affirmed.

The other Justices concurred.

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THE CHIPPEWA LUMBER COMPANY v. DANIEL TREMPER.

Deed—Condition prohibiting sale of intoxicating liquor—Public policy—Monopoly—Ejectment.

1. The right of a grantor to convey land on condition that the grantee shall not sell liquor upon the premises, coupled with a provision that in case of such sale the land shall revert to the grantor, who shall at once take possession thereof, cannot be denied, and is within the public policy of this State (*Smith v. Barrie*, 56 Mich. 314; *Watrous v. Allen*, 57 Id. 362); but courts will not enforce such condition if inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business.
2. In an action of ejectment by a corporation to enforce such a condition, it is competent for the defendant to show that a firm, of which plaintiff's sole business manager is a member, is engaged in the unlawful sale of liquor as a beverage, to the knowledge of such manager, in the same village with defendant, from which facts, if proved, the jury would be justified in finding that the plaintiff acquiesced in such sales, and desired to secure a monopoly of the business, all of which would be a perfect defense to the action.

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3. In such a case the fact that said firm was allowed to sell liquor without molestation, and with the assent or implied consent of plaintiff, would naturally be considered by the defendant as a waiver of the condition for its non-sale attached to the sale of lands in the village, and he would have a right to act upon such evidence of waiver until notified to the contrary.

Error to Mecosta. (Fuller, J.) Argued April 3, 1889. Decided June 7, 1889.

Ejectment. Defendant brings error. Reversed. The facts are stated in the opinion.

Glidden & Bates, for appellant.

M. Brown, for plaintiff.

MORSE, J. The Chippewa Lumber Company platted the village of Chippewa Lake, in Mecosta county. They inserted in all their contracts and deeds of lots sold the following clause:

"This conveyance is made upon the express condition that the said party of the second part, his heirs and assigns or lessees, shall not, for the term of thirty years from [the date of the conveyance was here inserted], sell, give away, or dispose of, in any way whatsoever, upon said premises or any part thereof, intoxicating liquors or drinks of any kind whatsoever; and it is mutually covenanted and agreed between the said parties hereto, their heirs, successors, and assigns, that these conditions are for the benefit of the said party of the first part, its successors and assigns, and if the condition is not fully observed by the said party of the second part, his heirs, assigns, and lessees, the said party of the first part shall at once take possession of the premises above described, which revert to and belong to the party of the first part."

Harvey P. Wyman was the secretary, treasurer, and manager of the plaintiff corporation, and the person who procured the insertion of this clause in the conveyances, as he testifies, for the benefit of the corporation, as the company employed a large number of men there in the mills, and, if saloons were permitted in the village, these men would "get

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tight," and would cause large expense and trouble in the management of the business of the company. He testified that he was the only member of the board of directors of the corporation who had any active part in the management of the business at Chippewa Lake.

April 25, 1885, the company deeded lot 2 of block 7, in said village, to Robert Gales. Gales subsequently conveyed the same premises to the defendant.

The plaintiff brought ejectment in the circuit court for the county of Mecosta, claiming a violation of the condition against selling intoxicating liquor, which was contained in the deed to Gales, and also in his conveyance to defendant, and had verdict and judgment in its favor. Evidence was given on the part of the plaintiff tending to show that defendant kept a saloon and sold liquor upon the premises, being licensed to do so under the existing laws in this State.

This was not rebutted by the defendant, but in his defense he sought to show the following facts, looking, as he claimed, towards a waiver upon the part of the plaintiff of the condition of forfeiture in the deed:

That the firm of H. P. Wyman & Co. was engaged in selling liquors in the village of Chippewa Lake; that intoxicating liquor was sold in their drug-store right along as a beverage; that the firm had been fined once for the sale of such liquor; that Wyman knew of such sales; that when one Dr. Clark was about to start another drug-store in the village Wyman told him a second drug-store could not live; that such a store could not succeed without selling whisky; and that, although he could not keep Clark from opening a drug-store, he could and would prevent his selling liquor.

Wyman testified that the plaintiff corporation was not interested in the drug-store of H. P. Wyman & Co., but admitted that he was.

The court ruled out this proposed testimony, and submitted the case to the jury upon the simple proposition that, if

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they found the defendant had sold intoxicating liquor or given it away on the premises, their verdict must be for the plaintiff.

The selling or giving away of intoxicating liquors in this State is a lawful business, if carried on in conformity to the statutes of this State governing the traffic in intoxicating drinks. It was not shown that the defendant had violated any law in the sale of liquor.

It does not seem to me that the Chippewa Lumber Company could, in the platting and sale of lots in the village of Chippewa Lake, so convey the lots as to grant for 30 years in effect a monopoly of the sale of liquor in themselves or any other person or persons. This would be contrary to public policy.

A jury would have the right to infer that the knowledge of H. P. Wyman that his firm was selling liquor in the village, and his participation in the same, was known to the plaintiff corporation, and consented to by it, since H. P. Wyman, one of the firm so selling intoxicating liquors, was the sole business manager of the plaintiff at Chippewa Lake, and holding two of its principal offices.

A jury would, from the facts offered to be shown, have been justified in finding that the plaintiff corporation was willing that H. P. Wyman should sell liquor, not only lawfully, but unlawfully, in Chippewa Lake, and was determined that no one else should lawfully dispense intoxicating drinks; thus creating a monopoly in the business to said H. P. Wyman & Co.

I am satisfied that no forfeiture of lands under the condition in defendant's deed, or the deed to his grantor, ought to be permitted for any such purpose, and that the facts offered, if proved, would have been a perfect defense to this action.

The testimony was also admissible for another reason.

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The fact that Wyman & Co. were permitted to sell liquor without molestation, and with the assent, or implied consent, of plaintiff, would naturally be considered by the defendant as a waiver of the condition attached to the sale of lands in said village. And he would have a right to act upon such evidence of waiver until he received notice to the contrary.

He would not be obliged to presume that the corporation intended to create a monopoly in itself, or one of its members, to sell liquors, which monopoly the law would not permit; and, under the circumstances as they naturally appeared to him, he could not be at once deprived of his land without notice. He was entitled to some claim or intimation on the part of the company that they intended to act differently towards him than towards others before he could be proceeded against in ejectment for a forfeiture under this condition against the sale of liquors.

I do not wish to be understood that the carrying on of a lawful business as a druggist, with no sales of liquor, except within the law, by the plaintiff or H. P. Wyman, would prevent an enforcement of the condition in the deed to defendant's grantor; but if it is shown that liquor has been sold unlawfully by H. P. Wyman & Co., as was proposed to be shown on the trial below, with the knowledge and consent of H. P. Wyman, the manager of plaintiff, at Chippewa Lake, while at the same time the said Wyman showed an intention to prevent, under the condition in the deeds to others, the sale of liquor by any one else in the village, whether such sale was lawful or unlawful, then the forfeiture of defendant's estate for a breach of this condition will not be permitted by the law, as it would be in restraint of trade, and the creation of a monopoly, and against public policy. It would then also appear that the alleged benefit of this condition to the company in preventing the sale of liquor to its mill-hands was not the reason of the insertion of such con-

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dition, or for its enforcement, but that the condition was for the purpose of profit to the company or its manager in the exclusive sale of liquor in the village.

Neither do I think that the company or H. P. Wyman could open a saloon under the tax-law, and enforce these conditions in the conveyances against all other persons, even if the sales of liquor in such saloon were kept strictly within the law.

I am well satisfied that it would be against public policy to permit the owner of a village plat to insert a condition in the conveyances of his lots that no bread should be sold upon the premises for 30 years, in order that he might himself have a monopoly in the village in the sale of bread.

Liquor is not a necessity, like bread, and is generally regarded as of damage to the general community; but I know of no good reason why a person should be permitted to have a monopoly in selling poison to a community any more than food, unless it be that no other person can be found fit to handle and dispense it. I do not believe, however, that any man or company should be permitted by the law, and aided by the courts, to create a monopoly in himself, either in the sale of bread or whisky.

The right to insert such a condition as the one in this case, for an honest and beneficial purpose, cannot be denied, and is within the public policy of this State. *Smith v. Barrie*, 56 Mich. 314 (22 N. W. Rep. 816); *Watrous v. Allen*, 57 Id. 362 (24 N. W. Rep. 104).

But courts will not enforce such a condition inserted for a dishonest purpose, and to the end that the grantor may thereby obtain a monopoly in any business, and all others be restrained therefrom; and there can be no difference in this regard whether the business so sought to be centered in one person in a community is one acknowledged by every one to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both

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are lawful; and certainly one cannot ask a court of justice to enforce such a condition as this against a person selling liquor otherwise lawfully, that he may reap the benefit of unlawful sales. Courts will not enforce forfeitures of estates for any such purposes.

The judgment of the court below must be reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

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FANNY R. S. BALEN v. URSULE C. MERCIER ET AL.

Recording laws—Contract of purchase—Mortgage of equitable interest—Lien for purchase money—Amendment of answer.

1. The record of a mortgage executed by a contract purchaser of land, who has gone into possession under an agreement with the vendors, is *constructive* notice to a subsequent purchaser or incumbrancer of the *legal* title.
2. Our statutes contemplate that any instrument entitled to be recorded shall *first* be entered in the entry book, *when* it is deemed recorded.
3. The purchase money is the first lien on land held under a land contract, and a mortgage given as security for money advanced to pay such purchase price takes precedence of a prior recorded mortgage of said property.
4. In the exercise of a proper discretion, the court may permit a defendant on the trial to file an *unsworn* amended answer, setting up want of notice or knowledge of complainant's mortgage, an answer under oath being waived. and the amended pleading containing no admissions available to the complainant as evidence. Under such circumstances, the signature of the defendant was a mere formality, which could be dispensed with.

Appeal from Roscommon. (Aldrich, J.) Argued April 3, 1889. Decided June 7, 1889.

Bill to foreclose a mortgage. Complainant appeals. Decree against defendant Keith reversed, and modified as to-

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defendant Crisman, and one entered in the Supreme Court against both of said defendants in accordance with the opinion, in which the facts are stated.

J. L. Stoddard, for complainant.

H. H. Woodruff, for defendant Keith.

J. L. Starkweather (*A. B. Maynard* and *Dwight N. Lowell*, of counsel), for defendant Crisman.

CHAMPLIN, J. A bill of complaint was filed on January 20, 1887, to foreclose a mortgage given by defendant Ursule C. Mercier to complainant, dated May 10, 1882, and recorded in Roscommon county May 24, 1882, and in Cheboygan county May 25, 1882, to secure the payment of $3,000 on May 10, 1885, with interest at 10 per cent. per annum, payable semi-annually, and six interest notes for the accruing interest, said interest notes maturing at the times interest was payable for said loan.

The property covered by the mortgage is situated in the counties of Roscommon and Cheboygan, and is described therein and in the bill of complaint as follows, viz:

"Lots numbered nine (9) and ten (10) of block numbered thirty-five (35), in the village of Roscommon, in Higgins township, according to the recorded plat thereof.

"Also, all her right, title, and interest in any and all contracts she may have with Waterman, Davidson & Co. to the north one-half (½) of the south-west quarter (¼), and the north-west one-quarter (¼) of the south-east one-quarter (¼), of section four (4), in town twenty-four (24) north, of range one (1) west.

"Also, all her right, title, and interest she may have in any and all contracts to lots number one (1) and two (2) in block seventy-four (74), Mackinaw City; said contract recorded in Liber K of Deeds, on pages 267 and 268, in register's office of Cheboygan county, Michigan, on the thirty-first day of March, 1882."

The bill contains the usual allegations found in foreclosure bills, and it shows that this mortgage was recorded in the

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office of the register of deeds for Roscommon county on May 24, 1882, in Liber 3 of Mortgages, on page 306, and in the office of the register of deeds for Cheboygan county on May 25, 1882, in Liber D of Mortgages, on pages 439–441.

It further alleges that, at the time of the execution and delivery of the notes and mortgage, Mrs. Mercier held a contract from Waterman, Davidson & Co. for the purchase from them of the north half of the south-west quarter, and north-west quarter of south-east quarter, of section 4, aforesaid, dated November 7, 1881, and recorded in the office of the register of deeds for Roscommon county on May 15, 1882, in Liber 1 of Miscellaneous Records, page 140; and that since the execution of the mortgage, and on the twenty-sixth day of December, 1885, Mrs. Mercier acquired the legal title to said lands; and the bill claims that all the right, title, and interest acquired by Mrs. Mercier in said lands after the execution and delivery of the mortgage inures to the benefit of complainant, and is subject to and covered by her said mortgage.

Defendant Keith answered, and set up that Mrs. Mercier made default under her contract, and neglected to pay either principal or interest, and such proceedings were had that she was divested of all right to the land, and requested him to step in and buy the land, which he did, and paid the purchase price to Waterman; that, before he would advance the money to buy, he insisted that Mrs. Mercier should give him a deed, which she did, dated November 13, 1885; that Waterman, by mistake, made the deed to her instead of to him; that he advanced $300 for principal and $18 for taxes.

We think the court exercised a proper discretion in allowing defendant Crisman to file amendments to his answer, setting up want of notice or knowledge of complainant's mortgage. Answers under oath were waived, and the amendment was in furtherance of justice.

It contained no admissions which could avail complainant

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as evidence, and was not evidence in defendant's behalf, and, under the circumstances, the signature was a mere formality that could be dispensed with.

Had the bill called for answer under oath, the case would have been different, and an unsworn and unsigned amendment would not be permitted.

The defendant Crisman claims that, at the time Mrs. Mercier executed the mortgage to Mrs. Balen, she had no title to lots 1 and 2, block 74, Mackinaw City, but at the date thereof the title was in one Henry Conklin, in fee; that in August, 1882, she desired to loan of defendant Crisman $2,500, and to secure him upon said lots; that, for the purpose of ascertaining whether the security was good, he went to Mackinaw City to examine and ascertain the title to said lots; and that, upon arriving there, he ascertained that she had no title to said lots, but held a land contract from Henry Conklin for the purchase of the same, upon which $200 had been paid by her, leaving a balance still due of $530. Defendant informed her that she had no title to the lots, but, if Conklin's title was perfect, and he would convey to her his title, defendant would loan her said sum. They then, with Conklin, went to the register's office for the purpose of examining the title of Conklin to the lots, and found his title perfect. Defendant then, at Mrs. Mercier's request, paid the balance to Conklin, and he executed a warranty deed of said lots to Mrs. Mercier, and she thereupon executed a mortgage to him to secure the payment of $2,500, which was the sum loaned at that time, including the purchase money aforesaid. This was September 1, 1882.

The money was loaned to her for the express purpose of paying the balance due upon the contract, and getting title from Conklin, and for the purpose of paying for materials and labor contracted by said Mercier for the purpose of erecting a hotel on said lots; and such money was so used, and for no other purpose.

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Afterwards, he loaned her an additional sum of $500, for which she gave her note and another mortgage on said lots; and later still, being some time in December, 1882, Mrs. Mercier desiring a still further loan in order to pay for material and workmen upon said hotel, and prevent liens for labor and material being laid thereon, he loaned her an additional sum of $2,100, and the two prior mortgages were discharged, and the whole loan was embraced in one sum of $5,100, and a mortgage was executed covering said lots for the whole amount.

Defendant claims that during all this time he had no actual notice or knowledge of complainant's mortgage.

After hearing proofs, the circuit court dismissed the bill of complaint as to Keith; and as to the property covered by the Crisman mortgage he decreed as follows:

"1. That there is due to the complainant upon her note and mortgage mentioned and set forth in the bill of complaint herein, for principal and interest to this date, the sum of four thousand one hundred and thirty dollars and twenty cents ($4,130.20).

"2. That there is due to the defendant Frederick S. Crisman upon his note and mortgage set forth in his amended answer, filed herein, for principal and interest to this date, including the several sums of money paid by said defendant for insurance upon the property covered by his said mortgage, the sum of six thousand six hundred eighty-four dollars and eighty-nine cents ($6,684.89).

"3. That the complainant has a lien upon lots 1 and 2 in block 74, in Mackinaw City, in the county of Cheboygan and State of Michigan, being a portion of the property covered by her said mortgage, for the amount that had been paid by the defendant Ursule Celina Mercier upon the contract given to her by Henry Conklin for the sale thereof to her, dated on the first day of April, A. D. 1882, at the time of the execution of the defendant Crisman's mortgage (which was on the twenty-seventh day of December, A. D. 1882), which amount is two hundred dollars ($200.00), with interest thereon at the rate of 10 per cent. per annum, payable semi-annually from the date of the complainant's said mortgage, viz., May 10, A. D. 1882, which is prior, superior, and paramount to the

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lien of the defendant Crisman thereon; and that the defendant Crisman has a lien thereon, subject to the lien of the complainant for the said sum of two hundred dollars ($200.00) and interest, as aforesaid, for the aforesaid sum of six thousand six hundred and eighty-four dollars and eighty-nine cents ($6,684.89), which is prior, superior, and paramount to the lien thereon for the amount due to the complainant as aforesaid, over and above the said sum of two hundred ($200.00) and interest, as aforesaid; and that the said complainant next has a lien thereon, subject to the said lien of defendant Crisman, for the amount due her as aforesaid, over and above said sum of two hundred dollars ($200.00) and interest, as aforesaid."

He decreed that the Roscommon property covered by the mortgage should be sold first, and gave other directions usual in decrees of foreclosure.

The interests of the two defendants who appeared and answered the bill of complaint will be considered separately.

First. As to the controversy between complainant and Crisman. The main question in issue is whether the record of a mortgage upon land of which the mortgagor has only a contract of purchase is notice to a subsequent purchaser or incumbrancer of the legal title, without actual notice of the mortgage.

The contract executed between Conklin and Mrs. Mercier conveyed to her an interest in lands. It was dated April 1, 1882. The consideration named in the contract was $700, $100 of which was paid down, and $100 was to be paid July 1, 1882; $100, October 1, 1882; $100, January 1, 1883; $100, April 1, 1883; $100, July 1, 1883; and $100, October 1, 1883.

It was mutually agreed that Mrs. Mercier should have possession of the premises from the date of the contract. The testimony shows that she went immediately into the possession, and commenced to erect a hotel thereon. She was then in possession, clothed with the equitable title. It was an interest in the land which she could sell, assign, or mortgage. By the mortgage executed to Mrs. Balen, Mrs. Mercier con-

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veyed her interest in the land covered by the contract as security for the money borrowed by her. The conveyance was duly witnessed and acknowledged; and as a mortgage it was entitled to be recorded in the book of mortgages, and to be entered in the entry book kept by the register of deeds. How. Stat. §§ 5674, 5675; *Sinclair v. Slawson*, 44 Mich. 126 (6 N. W. Rep. 207).

Our statutes contemplate that every instrument which is entitled to be recorded shall first be entered by the register in the entry book, and it is then deemed recorded. It shall next be spread at length upon the record books provided for that purpose. It shall lastly be indexed in the proper general index by entering alphabetically the name of every party to each instrument recorded by the register, with a reference to the book and page where the same is recorded. How. Stat. §§ 5674–5678, 5682.

The statutes contain no specific definition or direction as to what instruments in writing shall be recorded, and what shall not. How. Stat. § 5652, does, however, provide that—

"Conveyances of lands, or of any estate or interest therein, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed in this chapter, without any other act or ceremony whatever."

Section 5658 requires deeds of lands, or any interest in lands, to be executed in the presence of two witnesses, and acknowledged before some prescribed officer.

The statutes then prescribe the duty of the register of deeds. He is required to enter and record all deeds of conveyance absolute in their terms in one set of books, and in another set all—

"Mortgages and other deeds intended as securities, and all assignments of any such mortgages or securities."

I think it is beyond doubt that, under these provisions of

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our statutes, the mortgage of Mrs. Balen was entitled to be recorded. It was an instrument authorized by law to be recorded, and was properly recorded, and was notice to subsequent purchasers and incumbrancers of the mortgage and its contents. *Wing v. McDowell*, Walk. Ch. 182; *Cooper v. Bigly*, 13 Mich. 475, 476; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Johnson v. Stagg*, 2 Johns. 510; *Hunt v. Johnson*, 19 N. Y. 279; *Stoddard v. Whiting*, 46 Id. 627; *U. S. Insurance Co. v. Shriver*, 3 Md. Ch. 381; *Bellas v. M'Carty*, 10 Watts, 13; *Neligh v. Michenor*, 11 N. J. Eq. 539; *Wilder v. Brooks*, 10 Minn. 50.

How. Stat. § 5683, provides that every conveyance of real estate within this State, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

The statutes of other states contain like provisions; and the courts of other states and of this State construing such statutes have declared that conveyances, duly recorded, operate as constructive notices to subsequent purchasers and incumbrancers of the instrument and of its contents. It is true that several of the courts tack upon this construction a limitation that the record is notice only to those claiming under the same grantor, or one who is the common source of title. The reasoning proceeds in some cases upon the theory that the statute only provides for recording conveyances of legal estates in lands, and partly upon the theory that the registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed; and, when one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the claim is continued; and, consequently, when a purchaser has traced the title down to an individual

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out of whom the record does not carry it, the registry act makes that title the purchaser's protection.

The first theory stated has no application under our statutes, so far as mortgages are concerned. This is apparent from what has been above said.

Nor does the second theory apply to a mortgage or other conveyance by one in possession of the premises under a contract of purchase, for such possession is constructive notice of the rights under which the party holds. *Farwell v. Johnston*, 34 Mich. 342.

A party purchasing from the person in whom the legal title appeared to be of record could not hold the premises as against the contract purchaser in possession; and, when such purchaser is found in possession, then the party dealing with the owner of the legal title is bound to know that the contract purchaser has an interest in the land, which he may mortgage; and, if he has mortgaged it, and the mortgage is duly recorded, there is no reason why he should not be charged with constructive notice. *Alden v. Garver*, 32 Ill. 32; *Crane v. Turner*, 7 Hun. 357.

In such case the reason asserted in favor of a person relying upon the record of the legal title does not apply. He is bound to search for equitable titles and interests, because he is apprised that equitable interests have been created by the contract of sale and possession under it. There is no difficulty in ascertaining the name of the contract purchaser who is in possession. There is, therefore, no difficulty in his pursuing his search of the records through the index of the names of parties who have mortgaged. He has the same facility to trace the chain of incumbrances as to equitable mortgages that he has for legal incumbrances, and with as great accuracy.

In this case, Crisman not only knew that Mrs. Mercier was in possession, but he had actual knowledge of the contract of

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purchase; and it was as much his duty to look for incumbrances in the index under the letter "M" as it was under "C."

The purpose of providing an index is to facilitate search. This is apparent from the act of April 13, 1841, which provided for such index—

"In order that the records containing the title of lands may the more easily be preserved, and a search of said records to ascertain such title facilitated."

I had occasion to discuss this question in the case of *Edwards v. McKernan*, 55 Mich. 520 (22 N. W. Rep. 20), and to express my views upon the case of *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige, 361, and of *Wing v. McDowell*, Walk. Ch. 175, and I have seen no reason since to cause me to change the opinion then advanced; and I shall not review the authorities at length upon the propositions. It cannot be logically denied that the mortgage in question is notice to Crisman under the recording laws without denying that such mortgage was entitled to be recorded.

It does not affect the question under consideration that the contract between Conklin and Mrs. Mercier was not acknowledged and recorded. It was duly witnessed; and, had it been acknowledged and recorded, such record would have had the effect as notice provided for in How. Stat. § 5712. But the statute (section 5713) provides that—

"No contract for the sale of lands shall be deemed invalid for want of ackowledgment or recording."

There is no question as to the existence of the contract, or that Crisman had actual notice of its terms; and I have already said that he is held to have had notice of Mrs. Balen's mortgage.

Argument is made that, under the peculiar language of the mortgage relating to these contracts, it covered merely a

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chattel interest, and not an interest in real estate. I am of opinion that it conveyed to Mrs. Balen all the interest which Mrs. Mercier had under the land contracts, and no other. She stands in Mrs. Mercier's place. She had a right to pay the purchase money in order to prevent a forfeiture. She had the right to foreclose her mortgage security; and, upon a sale, the purchaser would take the interest of Mrs. Mercier, with a right to perform the contract and receive the deed.

But the purchase money is the first lien upon the premises; and, under the facts in this case, defendant Crisman, having advanced such unpaid purchase money, is entitled to a first lien upon the premises to the amount of such purchase money advanced, with interest at 8 per cent. until it matured, according to the contract, and interest at the legal rate thereafter. The balance of his mortgage is a second lien to that of complainant for the amount of her mortgage, which is subject to the purchase money and interest; and the sale under the decree will be made subject thereto.

The order of sale must be so marshaled as to sell the lands in Roscommon county first, and the lands covered by the Crisman mortgage last.

The defandant Keith purchased with actual notice of Mrs. Balen's mortgage. Under the testimony, his purchase operated as an assignment of the contract of purchase from Waterman; and the pretended forfeiture must be regarded as ineffectual. He is entitled to stand in the shoes of his grantor, Mr. Waterman, and to a first lien for the purchase money and interest according to the contract. The premises covered by his deed will be sold next after the land in Roscommon county, and will be made subject to his lien for the purchase money and interest.

The decree against defendant Keith must be reversed, with costs of both courts.

The decree against defendant Crisman must be modified,

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and a decree entered here in accordance with this opinion against both defendants.

The complainant will recover costs of both courts against Crisman.

MORSE, CAMPBELL, and LONG, JJ., concurred.

SHERWOOD, C. J. I concur in the result.

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WILLIAM CAMPBELL ET AL. v. DANIEL CAMPBELL ET AL.

Disposition of property by parent—Undue influence.

1. While natural justice would seem to call for an equal division of property between children, yet the Court cannot be insensible to the *absolute* right of a parent to dispose of his property in such manner as he sees fit, he being most capable of determining which of such children are most deserving, in his estimation; and the Court has no right to substitute its will or wishes, or ideas of what is just and right, for his.
2. On a review of the testimony, the decree is affirmed; and, the case being one involving questions of fact solely, reference is had to the opinion for further information.

Appeal from St. Clair. (Canfield, J.) Argued April 5, 1889. Decided June 7, 1889.

Bill to set aside a deed for fraud and undue influence. Complainants appeal from decree dismissing bill. Affirmed. The facts are stated in the opinion.

F. A. Baker, for complainants.

E. G. Stevenson (*William P. Wells*, of counsel), for defendants.

CHAMPLIN, J. Robert Campbell died September 25, 1883, leaving 11 children surviving him.

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The complainants are seven of the 11 children, who file their bill of complaint against four of the children and one George S. Granger to set aside a deed executed by Robert Campbell in his life-time, on the thirtieth of August, 1883, of 160 acres of land in the town of Columbus, St. Clair county, Michigan, to his son Daniel Campbell.

The consideration expressed in the deed is $4,000, but the real consideration was an agreement for the care, support, and maintenance of the grantor, which was evidenced by a writing executed cotemporaneously with the deed by the grantee, as follows:

"I, Daniel Campbell, of the city of Detroit, for and in consideration of a warranty deed to me made and delivered of the south-east quarter of section seventeen, of Columbus, by Robert Campbell, my father, do agree to take him, the said Robert Campbell, into my family, and furnish him with all food, clothing, and medical attendance during his natural life, or so long as he may live, in a manner suitable to his station in life; and I do agree that the said land shall be deemed and held liable to said Robert Campbell for said support.

"Dated this thirtieth day of August, 1883.

"In presence of— DANIEL CAMPBELL.

"G. S. Granger.

"Alexander Grant."

The complainants charge that said deed was obtained by the said Daniel Campbell fraudulently, for the purpose of cheating the other children and heirs of Robert Campbell out of their shares in his estate, said Daniel well knowing that his father was not competent to execute a deed, by representing to him that his other children, and particularly the complainants, had either stolen from him, or been instrumental in his losing, $1,400 in money, and that they had no regard or love for him, and would do nothing to take care of him in his illness and old age,—all of which representations and pretenses were false and fraudulent; that the deed was obtained by artifice and deception practiced by defendants

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upon Robert Campbell by undue influence; and that the consideration for the conveyance was utterly inadequate and insufficient, and the whole transaction was unconscionable and fraudulent.

We have given the testimony introduced in support of these charges due and careful consideration. It covers the history of the family of Robert Campbell, the father, from the time he left Canada and took up his residence in Columbus upon the farm in question,—a period of more than thirty years.

We gather from the testimony that Robert Campbell was a man possessed of a strong self-will, opinionated, obstinate, and of an irascible, ungovernable temper. His likes and dislikes were strong, and his conduct was liable to be influenced by his prejudices. When not in the heat of passion, he was kind-hearted and affectionate towards his family. He was one of those men who insisted that his word was law in his family, and disobedience in his opinion merited, and usually received, condign punishment, promptly administered.

I do not doubt, and the testimony tends to show, that the children inherited some of the obstinacy of the parent, and the matter of rearing so large a family was a task of some difficulty, even with a considerate and judicious parent.

That there were times when he misused and abused his wife and children during the 30 years he lived in Michigan, before his second wife died, there can be no controversy. The incidents of such abusive conduct have been detailed by his children, now contesting for his property, with painful particularity; and yet, taking the sum total of all the occurrences narrated, they make an insignificant fraction of the 30 years of the home life of Robert Campbell.

Some of the children left home of their own accord, and others were driven away by their father in the heat of passion, because they did not obey his behests.

The second wife of Mr. Campbell died in the spring of

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1877. Joseph, the youngest child by the first wife, had died a few days before the step-mother, and up to the time of his death there were living eight children by the first and four by the second wife.

Up to the time of the death of the second wife, Robert Campbell exhibited no partiality for one of his children more than another. They were all treated alike. It is claimed by complainants that defendant Daniel was maltreated and driven away from home years before this time, and was living in Detroit. John had been driven away because "he would not pick his goose;" Sarah, because she insisted upon keeping company with a young man after her father had forbidden her to do so. All of the others left home voluntarily. There is some conflict of testimony as to whether Hugh and Catherine were driven away, or left home of their own accord, but, under all the circumstances, I think they left voluntarily, and against the wishes of their father.

There does not seem to have been the best of feeling between the children and their father, or between the children themselves. If we give credence to the testimony of the children, there were plots and counterplots to obtain from the father his property.

It is charged that Daniel endeavored to induce some of his brothers of the first wife's children to join him in the effort, before the death of the second wife, to obtain a deed of the farm; giving as a reason that the second wife would influence their father to make the property over to her, and then her children would get the whole of it.

It is charged by Daniel that his brothers approached him with the proposition to have a guardian appointed over their father, on the ground that he was incapable of taking care of his property, and was disposing of it at a great sacrifice; while it is charged by William and George that Daniel tried to have them join him in sending his father to an insane asylum on the ground that he was crazy.

They also claim that Daniel took every occasion to preju-

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dice the mind of their father against the other children, and represented them to their father as stealing from him, and trying to get his property.

In the spring of 1877, all the children above 21 years of age had left home, leaving Robert Campbell and his wife upon the farm with the children, Sarah, aged about 21, Catherine, 14, and Hugh, 10 years, remaining in the family. Robert Campbell was then about 62 years of age. Samuel was working at a neighbor's. John was living on a farm nearly opposite the land in question. William, Daniel, George, and Joseph were living at Detroit. Nancy was married, and living in Canada. The testimony does not show the whereabouts of Robert and Archibald at that time.

It is claimed that many years prior to 1877 an amicable arrangement had been entered into between Robert Campbell and his wife; that she was to have the avails of the butter and eggs produced upon the place, and Mr. Campbell was to have the avails of the stock and farm produce. There is also testimony tending to show that Mr. Campbell intrusted his wife with the care and keeping of the money received by him, and that it was the purpose of the parties to apply the accumulations thus made in building a new house upon the farm; the house they had occupied in rearing their family being a log house. It is claimed that Mrs. Campbell had in her possession quite a sum of money, which she guarded with jealous care, sometimes secreting it in one place and then in another; the amount at the time of her death being, as claimed by the complainants, a little over $800, and, as claimed by Robert Campbell in his life-time, over $1,400.

In the month of April, 1877, William Campbell was taken sick. The disease proved to be the small-pox. Joseph, who was boarding with him, was taken with the disease. His step-mother came to care for him. Joseph died, and Mrs. Campbell was also taken sick, and died at William's house on May 2, 1877. During her illness she called George to the

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window, and instructed him to go to the farm, and get from Sarah, in whose care she had left it, the money, and divide it equally among her four children. George did as requested. Complainants claim that this money was solely the avils of the butter and eggs, and belonged exclusively to Mrs. Campbell.

Robert Campbell in his life-time, without reference to the source from whence it was derived, claimed that the money was his, and that the children had no right to it. He charged his children with having stolen it from him, and evidently felt that a great wrong had been perpetrated upon him. He charged William with having instigated it, and George and Sarah with having done it. If he believed that it was money which they had laid aside for the purpose of building a house to the amount of $1,400, or over, more or less of it the avails of his savings from the sale of stock and produce, he had cause for feeling aggrieved over the transaction.

By the death of his wife he was left with the three children above named, but George went back in the early part of May, and made some arrangements about working the place on shares. In July, Sarah left, and a little later George had some dispute with his father, and was ordered off the place, and Catherine and Hugh left at the same time. These children went to Detroit, and stopped, a portion of the time with Daniel, who lived at Springwells, and a portion of the time with William. It appears that Mr. Campbell made efforts to get Catherine and Hugh to return to him, and also one and another of the unmarried boys to come and live with him, offering to let them work the place. It appears that Archibald would not do it unless he would make a deed of the place to Archibald or Daniel, and Samuel would not do it, and gave no reason for refusal.

Several letters were put in evidence to show that Daniel was endeavoring to prejudice the mind of his father against complainants, and especially against William, viz.:

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"SPRINGWELLS, September 20, 1877.

"*Dear Father*: I am very sorry I have no influence over the children in regard to having them go home. I was there to-day, and they said they would not go home. Perhaps if you come after them yourself they will go home, for I think they are influenced by the older ones not to go, and my opinion of William sending for them is only a put-up game to collect board from you. You want to look out for yourself, for if there is such a thing to be got he will get it. Don't let him get the start of you. Hugh is starting going to school. Sam is here. You might as well give up all hopes of them coming home, and give up the idea of staying there all winter; but write as soon as you get this, and let me know if you are coming down after them or not. I can't think of no more at present.

"From your affectionate son,

"DANIEL CAMPBELL."

"October 1, 1877.

"*Dear Father:* I received your kind letter, and was glad to hear from you. We are all well, hoping that this will find you the same. There is nothing new here, at least that I know of. William and George passes me on the street, and don't speak to me. I heard that Katy has been sick, but she is better now. I heard Sarah was going to get married this week to Brophy. They have got the money for Sarah, and George said they had it, and they would like to see you get it, for it never belonged to you.

"Now, father, there is no use of your feeling bad about what's gone, but use what you have left, for William has said he would get more for them So look out for him, for if there is any way he will. Write soon, and let me know what you think of doing, for it is impossible for you to stay alone there all the time, and you had better come down and see us any way. If you can't stay very long, it will do you good to have a rest. Please write, and let us know what you think of doing. Write soon, for I am anxious to hear from you. From your loving son,

"D. CAMPBELL.

"Direct, Mr. D. Campbell, Detroit, care P. Jewell & Sons, Mich."

"SPRINGWELLS, December 20, 1877.

"*Dear Father:* I now take the pleasure of writing you a few lines to let you know we are all well. When I got home that night Sam was at the house. He was telling Jessy she

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need not look for me home before Thursday, for he was sure I would be in Port Huron Monday, getting a deed of the place. So he waited Monday to see if I got back. I went up town last night to see what I could learn. I heard that they had Robert posted on the matter, and received letters very often from him, and that they meant business. I heard that they had been to Lawyer Minock's, but didn't learn for what purpose, but the will business had been talked over before by them long before I knew anything about it. I heard that William knew all about the children leaving home before ever they came to Detroit.

"People there are talking about it not being safe for you to be living there alone. I have talked the matter all over with Jessy, and she is quite willing to do what you think is best. If you don't think of coming to Detroit to stay, that you have been there long enough alone, for it is a terrible heartless looking thing for you to be living there alone. No more at present. From your affectionate son,

"DANIEL CAMPBELL.

"Write me soon, and let me know how things is."

"OFFICE OF DETROIT LEATHER COMPANY,
"DETROIT, MICH., September 13, 1881.

"*Dear Father:* I thought I would write you a few lines, and let you know that I will be up next week to get one or two horses. How is the mares looking? Do you want to sell them? If so, let me know, and if they will drive in the buggy, and if you have took the colts from them yet. If I bought them, we would want to drive them right away. So if you think of selling, fit them up a little. We are all well at present.

"Archibald Campbell was down to see us not long ago, but he had poor luck with Katy, trying to have her go home. He got a cool reception at Will's and George's. I have not heard from him since he left. No more at present. Answer this by return of mail.

"From your affectionate son,

"D. CAMPBELL."

Also a letter from Archibald Campbell, bearing date August 10, without naming the year; but, from the reference in the preceding letter to Archibald's visit and efforts to get the children to return home, it is likely that it was written in 1881. It reads as follows:

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"LUDINGTON, August 10.

"*Dear Father:* I thought I would write a few lines to let you know that I reached here all right. I have talked with my sister about going home, but it is of no use, because her brothers has their influence over her, and it is of no use to try to get her to go home, for they want nothing but the farm, and if they get any chance they will try to get it, and they will turn you out if they possibly can, and I think that the best thing you can do is to get your property fixed so they can't get any hold on it, for Will says he shall get it if he can, and I think you have enough of it now. Kate says that she is going to sue for her share before long, and I think she has got her share now, the way she has done.

"Father, I can't see no object in going home excepting you make it an object for me, because if anything should happen you they would put me off of the farm. I would be my labor out and get nothing for it; but, if you will make the property over to me or Dan, you will have the handling of the farm while you live, and then I will receive something for my labor, for my object is to keep it away from them; and if you will do that I will come home and stay with you, for I don't want to see you live there alone. I think something will happen you if you are left there alone, dear father. That is for this time. Please answer as soon as possible, and let me know what you will do.

"ARCHIE CAMPBELL.

"Direct to me at Ludington, Mason County."

Daniel testified that the first time his father talked with him about deeding the place to him was in 1877; that he sent for him to come up to the farm, and wanted to deed the property to him; that he told him he did not want it; that the next spring he went up there, and he talked of drawing up a deed then, and for him to move up there, and he told him that he didn't care about it.

It appears from the testimony that in the summer of 1883 a fatal malady had developed in the mouth and throat of Mr. Campbell. He had advised with local physicians, who advised him to consult Dr. McGraw, of Detroit. Accordingly in August he, in company with a neighbor, Mr. Grant, went to Detroit, and visited Dr. McGraw, who advised him that he was afflicted with a cancer, and that it was incurable. Mr.

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Grant testifies that the doctor told him that he would live but a short time. At Mr. Campbell's suggestion they then went to see his son Daniel, whom he wished to come and take care of him, and he would deed him the place. It was finally arranged that he should come up to Columbus the next day. He did not go, however, until the next day but one, when the deed and agreement to support were executed. There was no secret with reference to the determination of Mr. Campbell to deed the land to Daniel. Hugh was there, and he was informed of it.

So far as the capacity of Robert Campbell is concerned in this investigation, I think he was both physically and mentally competent to transact the business done upon that day. He was not crazy or weak-minded. Had the transaction been between strangers, and the defendant occupied the position of a mere purchaser, the consideration would have been grossly inadequate. The premises conveyed were worth at least $30 an acre. But here the transaction was between parent and child, made in contemplation of approaching dissolution, and under circumstances which partook very much of the character of a testamentary disposition of the farm. It is in testimony that he had often said he intended to give the farm to Daniel, and if the transaction cannot be impeached for fraud, or undue influence, which is a species of fraud, it must stand. If otherwise valid, the delivery of the deed was sufficient, and passed the title.

The question of undue influence is the only one upon which we have had any doubt. We cannot approach the question without being sensible to the influence that natural justice would call for an equal division of the property among all the children, share and share alike. This would be the case where all are alike deserving. But we must not be insensible to the absolute right which a parent has to dispose of his property in such manner as he sees fit; that he is most capable of determining which of his children are most deserving in his

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estimation, and that we have no right to substitute our will or wishes, or our ideas of what is just and right, for his.

It is plain from the testimony that there existed a feeling of mutual jealousy between Daniel and William. It appears that Daniel had taken his father's side, or at least sympathized with him, in reference to his position over the money which was taken away by George, and also from the children leaving their father, and refusing to return to their home. It is equally obvious that William sided with the children, and against the father, upon the money question. Which was right and which wrong it is not necessary for us to determine. The question is, did Daniel make use of this dispute and of this circumstance to influence his father to convey the farm to him?

The only testimony of any weight which has any bearing upon it is the letters written by defendant Daniel to his father. These letters show a manifest bias against William, but it seems to me they fall far short of proving any undue influence over the mind of Robert Campbell, five or six years later, in executing the deed in question. The whereabouts of Robert were unknown, but there were John and Archibald and Nancy, who certainly had nothing to do with the taking or disposition of the money, and whatever reflections the letters contain against the actions of William certainly did not influence him against the other children I have named, as not worthy either of his gratitude or bounty.

Soon after the deed was executed these complainants filed a bill to prevent its being carried into execution, in which they took substantially the same ground which they do in this bill in this suit. Robert Campbell was made a defendant. On the thirteenth of September, 1883, he made an affidavit in that suit, as follows:

"ST. CLAIR COUNTY—ss.

"Robert Campbell, being duly sworn, says that he is one of the defendants in the above-entitled cause, and executed

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the deed referred to in the complainants' bill of complaint from Robert Campbell to Daniel Campbell, on the thirtieth day of August, 1883.

"That deponent has not heard read the complainants' bill of complaint herein, but has been informed that the complainants herein allege that said deed was so executed by deponent on account of my having been unduly influenced so to do by the other defendants, Daniel Campbell, George S. Granger, and Alexander Grant, and that deponent at the time of the execution of such deed was not of sound mind or capable of transacting business, etc.

"That in so far as any statements are made in said bill of complaint that deponent was unduly influenced, or influenced at all, in his action and purpose in making said deed by the said Daniel Campbell, George S. Granger, or Alexander Grant, collectively or individually, the same are entirely without foundation, and untrue; that deponent in so doing did what he had intended to do for a number of years, and particularly since an occurrence whereby dependent lost, very soon after his last wife's death, fourteen hundred dollars in money, and a large share of his household goods, bedding, etc., the same being taken from his house, as deponent believes, by or through the instrumentality of the complainants and other of his children.

"That, in addition to this occurrence, there were many other reasons which operated upon defendant's mind, and led him of his own accord, and solely upon his own judgment, to make such deed.

"That deponent several times, and as long as three or four years ago, proposed to said Daniel to do what he has now done; but, on account of the conduct and talk of complainants, as said Daniel informed me, he did not want to make such arrangement, although deponent had not abandoned his intention of giving to his son Daniel his property, to wit, said farm, or in any manner or to any extent changed his feelings towards complainants and others of his children; being in good health, and able without much discomfort to manage his own affairs, deponent simply postponed the doing of what he had so made up his mind to do long ago.

"That for a short time, comparatively, before the execution of such conveyance, deponent began to suffer from a cancer, and, being quite aged and requiring constant care, he determined upon inducing his son Daniel and his wife to undertake to care for him, and proposed the arrangement, which was closed on the thirtieth of August, 1883, by the execution of the deed aforesaid.

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"That deponent, up to the time of the execution of said deed, had always managed and transacted his business, and always felt competent to do so, and believes fully that he was competent to dispose of his property, and knows that he did dispose of it as he desired to do, and as he had long ago decided he would do when he came to disposing of it; and deponent knows that if he was ever of sound mind, and capable of attending to his own business or to dispose of his own property, he was at the time he executed said deed, and still is.

"That soon after the execution of said deed deponent was taken worse, and deponent was for a time confined to his bed; but notwithstanding he is in feeble health, and has suffered considerably, he has known what was going on and what he was doing, and has always since such time fully realized what he had done, and is entirely satisfied with his action in so doing.

"That deponent made no disposition of his personal property, and still owns the same, but is desirous of disposing of the same, and converting it into money, and to that end has requested his son Daniel to so dispose of the same, he not having been, on account of his health, able to look up customers for his property, or otherwise look after its sale, and has consulted with his neighbor Alexander Grant, and requested him to assist him in so disposing of the same.

"That deponent expected to make use of a portion of such money for his own benefit, and to assist his son, who has not, so far as deponent knows, the means of successfully operating said farm without assistance from him, which deponent promised when he undertook to care for deponent.

"That said property was all acquired by deponent's own labor and exertions, and he had supposed he had a perfect right to dispose of it as to him seems best, and, under such impression and belief, has done what he has done and proposed.

his
"ROBERT X CAMPBELL.
mark.

"Subscribed and sworn to before me, September 12, 1883.
"Albert Stephenson,
"Notary Public, St. Clair Co., Mich.

"Witness, as to signature and mark of Robert Campbell:
"Daniel G. Gleason."

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Two medical witnesses were examined as to his mental condition on the same day, and although not experts in mental diseases, testified that he was of sound mind.

While it is true that the language employed in the affidavit is that of the attorney who drafted it, yet it was read over to him, and he appeared to comprehend it, and duly verified the same. If it is entitled to any credit as expressing his act and intention, it ought to be an end of the case. It is certainly corroborated by other evidence as to his intentions, and also as to the delivery of the deed, and the reasons stated for giving the property to Daniel are in consonance with all the testimony.

It follows that the decree of the circuit court must be affirmed.

The other Justices concurred.

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OLIVE BELL v. AUGUST ZELMER ET AL.

Intoxicating liquors—Action by wife for injuries resulting from sale—Evidence—Witness—Impeachment.

1. It has not yet been determined in this State that one who sells or gives liquor *lawfully* to an *adult* person is responsible for his death or for injuries inflicted on account of his intoxication; and in all cases before this Court, where a recovery has been asked for under the statute, the sale was in violation of the statute.
2. A court or jury would not be justified in finding a defendant liable for damages for the consequences of a sale of liquor upon a given day solely upon the testimony of a witness who testifies that he thinks he and the deceased did *not* go into the defendant's saloon on the day named, or get any liquor there, and that he was mistaken in his contrary statement made before the trial, or on a previous trial.
3. A plaintiff cannot ask for a verdict upon the uncorroborated evidence of a witness whom he has himself impeached.

Error to Ionia. (Smith, J.) Argued April 10, 1889. Decided June 7, 1889.

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Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Lemuel Clute, for appellant.

Mitchel & McGarry (*Davis & Nichols*, of counsel), for defendants.

MORSE, J. On the thirtieth day of December, 1885, the defendant August Zelmer was a saloon-keeper in the city of Ionia. Schmoltz and Kennedy were sureties on his bond, the penal sum of which was $3,000.

On that day John Bell, a farmer living in the township of Odessa, in Ionia county, came from his home to the city of Ionia with a team of horses and a buggy.

While there he met a neighbor, Charles McRoberts, with whom he visited several places and drank liquor. About dark he started for home, McRoberts riding with him. They had some difficulty on the road, arising probably from the effect of the liquor they had drank. Finally Bell ordered McRoberts out of his buggy. McRoberts got out and Bell drove on. The next morning Bell's team was discovered near his home. Bell was hanging out of the buggy, dead, his feet being caught in the seat of the buggy, his head touching the ground. It appeared that the team had come some distance with Bell hanging in this way, his head dragging upon the ground.

The plaintiff, his widow, brought suit March 24, 1886, against Zelmer and his bondsmen under the statute (Act No. 259, Laws of 1881, as amended by Act No. 191, Laws of 1883), claiming that Zelmer sold her husband liquor, which contributed to the intoxication that caused his death.

It appears from the record that the first trial of the cause resulted in a verdict for plaintiff, which was afterwards set aside by the circuit judge upon a motion for a new trial.

The cause came on again to be tried in the Ionia circuit

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before a jury, on the nineteenth day of December, 1887. Upon the swearing of the first witness, the plaintiff, the counsel for the defendants objected to any testimony being introduced in the case tending to show any liability against the defendants, or any liability against the sureties in the bond, for the following reasons:

"1. Because neither the common law nor statute gives the right of action for the death of a human being under the circumstances in the declaration counted on.

"2. There is no cause of action alleged against the principal in the bond, for the reason that there is no wrong alleged out of which the injury complained of grew or originated. There is no allegation of an illegal sale of liquor, nor that the sale made was not lawful.

"3. There is no liability against the sureties, Schmoltz and Kennedy, alleged in the declaration, because—

"*a*—The form of the declaration is in trespass on the case.

"*b*—The sureties are alleged to be guilty of no wrong save only the signing of the bond, which is not unlawful.

"*c*—Because there is no breach of the conditions of the bond alleged."

This objection was overruled, and the case proceeded.

The only person who gave any evidence tending to show that the husband of plaintiff drank or procured any liquor at the saloon of Zelmer was Charles McRoberts, who, when first placed upon the stand as a witness for the plaintiff, testified as follows:

"I reside in Odessa, where I have lived for sixteen years. I am a farmer. Knew John Bell in his life-time. My farm joins the one he lived on in '85, and where his family now live.

"I was here in Ionia with John Bell on the day previous to his death, in December, '85. I could not say how much I was in his company on that day. I think I met him about 12 o'clock, first. I knew of his drinking liquor in Ionia that day. I know the defendant August Zelmer.

"*Q.* While in Ionia on that day, did you go into Zelmer's place of business?

"*A.* That I am not capable of saying. I do not think I did.

"*Q.* Did you testify in this case once before?

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"*A.* Yes, sir.

"*Q.* Do you remember how you testified then?

"*A.* Yes, sir; I do. I think, sir, I was mistaken at that time. I think I was mistaken of the place.

"*Q.* Do you know what place of business Zelmer kept at that time?

"*A.* Yes, sir; I do. He kept a saloon."

He was then examined and cross-examined for a long time by the attorneys for the plaintiff, first one and then the other taking the witness and endeavoring to get from him a positive statement that he and Bell drank in Zelmer's saloon that day, and an admission that he so positively testified on the first trial. The witness hesitated some, and at times was inclined to be evasive in his answers, but he insisted that he was not positive before the first trial, and only meant to testify to the best of his recollection. He admitted that, before the first trial, he pointed out to Mr. Clute, one of plaintiff's attorneys, Zelmer's saloon as one of the places where he thought he got liquor with Bell. He claimed that he was never certain about it, as he had been drinking a good deal on the thirtieth of December, 1885, and that he had been thinking of the matter since, and had come to the conclusion that he was mistaken.

On being asked by Mr. Clute, "Do you know you are mistaken?" he answered:

"No, sir; I don't know positively whether I am mistaken or not. My memory tells me that I might be mistaken, and—and I think that I am mistaken, but—"

"*Mr. Blanchard* [counsel for plaintiff]. I would like to ask you what saloon it was, then.

"*The Court.* Do you know what saloon you were in that day that is on the south side of the street?

"*A.* No, sir; not positive."

It appeared from the testimony of the witness that before the second trial began he went voluntarily to the office of Mr. Clute, plaintiff's counsel, who planted the suit, and told him that he could not swear that he and Bell got liquor in Zelmer's place, as he had become convinced that he was mis-

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taken in naming his saloon as one of the places where liquor was obtained.

After the witness had been exhausted by the attorneys on both sides, the court asked him:

"Witness, what do you say now as to whether you were in Zelmer's with Bell, when Bell was there, December 30, 1885?

"*A.* I thought at the time that that was the saloon that I was in.

"*The Court.* I asked you what do you say now?

"*A.* Well, I say that I think I was mistaken."

The witness stated that in the last saloon which he and Bell went into that day Mr. Olmstead, the keeper of a feed-stable, was with him, and drank with them, and that Olmstead only went to one saloon with them that day, and only once into that one.

Olmstead, being sworn, testified that he remembered going, in December, 1885, with the witness McRoberts to Zelmer's saloon to get a drink of liquor, but he thinks no one went with them; that he was not personally acquainted with Mr. Bell.

On the trial the witness McRoberts' attention was called at different times to his testimony on the first trial, and he was asked if he did not then answer as follows to questions then put to him:

"*Q.* Are you sure that you saw Zelmer that day?

"*A.* Yes, sir.

"*Q.* Did you see him in the saloon?

"*A.* Yes, sir."

To which he replied that he did not so testify. He was repeatedly asked if he did not testify positively on the first trial that they went into Zelmer's saloon and obtained liquor, and his uniform answer was that he so testified to the best of his memory; that he thought so then, but now thought he was mistaken.

Thereupon the counsel for the prosecution offered in evi-

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dence the stenographer's minutes of his testimony on the first trial, and stated that he offered the same for the following reasons:

"1. To show how the witness swore on the former trial.

"2. Because his failure in memory is, in effect, the same as though he had lost his mind from disease or insanity.

"3. The evidence being between the same parties, involving the same issue, we have a right to submit it to the jury, and let them say whether his memory was correct on the former trial.

"4. The facts clearly indicate that the witness has been tampered with by the defendants, with a view of obstructing the course of justice, and that his claim as to want of memory, as to whether Mr. Bell got liquor in Zelmer's saloon is a mere pretense resorted to in order to protect defendants from a verdict against them."

The offer was rejected by the court.

At the close of the testimony on the part of the plaintiff the defendants demurred to the evidence, and insisted upon a verdict in their favor, for the reason that the evidence failed to make a case against them.

The court took this view of the case, and directed a verdict for the defendants.

Some interesting questions are argued before us, and would arise in this case if a new trial were to be granted.

It is not alleged in the declaration in this suit that the sale of liquor by the defendant Zelmer to the husband of plaintiff was unlawful, and if it should be taken for granted that the testimony of McRoberts established the fact that Bell obtained liquor at Zelmer's, which liquor contributed to his death, there is yet in the record no testimony tending to show that the sale to Bell came under any one of the prohibited sales under the statute. It is not shown that he was a person in the habit of getting intoxicated. He was not a minor, nor an Indian, nor of Indian descent, nor had any one forbidden the sale of liquor to him. The sale to him, as shown by this record, was a perfectly lawful one, if the defendant Zelmer sold any liquor to him.

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It has not yet been determined in this State that one who sells or gives liquor *lawfully* to an adult person is responsible for his death or for injuries inflicted on account of his intoxication; and in all the cases before this Court, where a recovery has been asked under the statute, the sale was an unlawful one, and in violation of the statute. See *Steele v. Thompson*, 42 Mich. 594 (4 N. W. Rep. 536); *Kehrig v. Peters*, 41 Id. 476 (2 N. W. Rep. 801); *Clinton v. Laning*, 61 Id. 355 (28 N. W. Rep. 125); *Anthony v. Krey*, 70 Id.—— (38 N. W. Rep. 603); *Johnson v. Schultz*, 73 Id.—— (41 N. W. Rep. 865); *Brockway v. Patterson*, 72 Id.—— (40 N. W. Rep. 192); *Flower v. Witkovsky*, 69 Id.—— (37 N. W. Rep. 364); *Friend v. Dunks*, 37 Id. 25, 29, 30; *Kreiter v. Nichols*, 28 Id. 496, 499; *Ganssly v. Perkins*, 30 Id. 492; *Wilson v. Booth*, 57 Id. 249 (23 N. W. Rep. 799); *Thomas v. Dansby*, 74 Id.—— (41 N. W. Rep. 1088); *Larzelere v. Kirchgessner*, 73 Id.—— (41 N. W. Rep. 488).

The statute provides that—

"Every wife * * * who shall be injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person, or by reason of the selling, giving, or furnishing any spirituous, intoxicating, fermented, or malt liquors to any person, shall have a right of action in * * * her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to * * * such injury, and the principal and sureties to the bond hereinbefore mentioned shall be liable severally and jointly with the person or persons so selling, giving, or furnishing any spirituous, intoxicating, or malt liquors as aforesaid. * * *"

This section of the statute, numbered 16, was added to Act No. 259, Laws of 1881, by Act No. 191, Laws of 1883 (How. Stat. §§ 2270–2283). It is therefore a part of said Act No. 259 of the Laws of 1881, the title of which is as follows:

"An act to regulate the sale of spirituous, malt, brewed, fermented, and vinous liquors; to prohibit the sale of such

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liquors to minors, to intoxicated persons, and to persons in the habit of getting intoxicated; *to provide a remedy against persons selling liquor to husbands or children in certain cases,* and to repeal all acts or parts of acts inconsistent herewith."

The title of the act does not seem to provide a remedy to the wife against the sale of liquor in *all* cases to her husband, and, being a part of the act which seeks to make the sale lawful to certain persons and unlawful to others, the query naturally arises whether the right of action given by the amended or new section (No. 16) was not intended to apply only to intoxication arising from the sales prohibited by the act.

Though the part of the section giving the right of action would seem to be broad enough to cover all injuries resulting from intoxication, whether or not the liquor was sold or furnished lawfully, still the concluding portion of the section, giving a right of action upon the bond, the form of which is prescribed by the same statute, would appear to restrict the right to cases wherein it is shown that some condition of the bond has been broken.

In *Flower v. Witkovsky, supra,* we held the title to Act No. 259, Laws of 1881, to be within the Constitution, with section 16, Act No. 191, Laws of 1883, included as a part of it.

We then said:

"The main purpose of the act is to regulate and prohibit the sale of liquors, to provide when it shall be lawful and when it shall be unlawful, and what remedies may be resorted to in cases of *unlawful* selling, and injuries resulting from such *unlawful* sales. These things all belong to one primary object, which is the distinguishing of lawful from unlawful sales under the law, and providing penalties and remedies against *unlawful* sales, and the natural consequences resulting therefrom."

Another serious question also would arise. The sureties on

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Zelmer's bond, the defendants Schmoltz and Kennedy, obligated themselves that Zelmer should not—

"Directly or indirectly, by himself, his clerk, agent, or servant, at any time, sell, furnish, give, or deliver any spirituous, malt, brewed, fermented, or vinous liquor, or any mixed liquor a part of which is spirituous, malt, brewed, fermented, or vinous, to a minor, nor to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, nor to any Indian, or to any person of Indian descent, nor to any person whose husband, wife, parent, child, guardian, or employer shall forbid the same, and that he would pay all damages, actual and exemplary, that may be adjudged to any person for injuries inflicted upon them, either in person or property, or means of support, by reason of his selling, furnishing, giving, or delivering any such liquors."

There is no evidence in the record before us to show that Zelmer had, at the time of the commencement of this suit, broken any of the conditions of the bond, as above set forth. Can the sureties in such a case be held to a liability to which they have not obligated themselves,—one not "nominated in the bond?"

In *Anthony v. Krey, supra,* we held that the sureties could be joined with the principal in the bond, because the principal had not kept the covenants of the same as to the selling and furnishing of liquor, as it was alleged in the declaration in that case that he had unlawfully sold or furnished liquor to the husband of the plaintiff, he being at the time of such sale a person in the habit of being intoxicated.

If it should be determined that a person could be held for a lawful sale or furnishing of liquor in case a person, intoxicated in whole or in part by the drinking of such liquor, should injure some one, or some one should be injured by reason of such intoxication, it would still remain to be determined whether the sureties would be liable until the principal was sued and a judgment obtained against him, which he neglected or refused to pay. If the sureties in such case can

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be joined with the principal, and made liable before any judgment is obtained against him, the right to sue must arise out of the statute, as such liability cannot be found in the terms of the bond.

But in our view of the case it is not necessary to dispose of these questions, or to ascertain whether or not the action was properly brought in trespass on the case.

We are satisfied that the court committed no error in rejecting the evidence of McRoberts, as taken on the first trial, and that no jury could be authorized to find a verdict against the defendants upon his testimony as given on the last trial.

It certainly would not be proper for a court or jury to find the defendants liable in damages for the consequences of selling liquor to Bell on the thirtieth day of December, 1885, solely upon the testimony of a witness who, when sworn upon the trial, thinks he and Bell did not go into Zelmer's saloon that day, or get any liquor there, and that he was mistaken in his statement before the trial, or on a previous trial, that they did go in there and get liquor. When he is the only witness relied upon to prove the sale of the liquor, and the only one giving any evidence tending to show any such sale, the jury must take his testimony as it is given, and cannot render a verdict upon what he has previously said out of court, or upon a prior trial of the same case.

There was no evidence in this case, outside of the testimony of McRoberts, tending to show that Bell procured any liquor at Zelmer's saloon. The evidence showed three saloons adjoining one another, on the same side of the street, one of the outer ones being Zelmer's.

McRoberts is certain that he went into one of them with Bell, which one he cannot tell, but thinks it was not Zelmer's; thinks that since the first trial he has seen the young man who sold him the liquor in this saloon (Jock Ingalls), who kept or "tended bar" in one of the other saloons; is certain

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that he did not see Zelmer in the saloon, and he is acquainted with him.

Error is assigned because the court would not permit the plaintiff's counsel to introduce in evidence the testimony of McRoberts as given upon the first trial of the case.

If it would have been proper, under the circumstances of this case (which it is not necessary to determine), to introduce this testimony for the purpose of impeaching the witness, still its admission for that purpose could not have been of any benefit to plaintiff. She certainly could not have asked from the jury a verdict of damages against the defendants upon the uncorroborated evidence of a witness whom she herself had impeached, nor could the jury, as before said, have been authorized to find such a verdict upon the testimony of McRoberts given upon another trial, and antagonistic to his evidence on this trial.

It was also claimed in favor of the admission of this testimony that there was evidently a "failure in memory" in this witness in effect, and that for this reason the plaintiff was entitled to read in evidence his testimony taken on the former trial the same as if the witness had lost his mind from disease or insanity.

But the testimony of McRoberts, as given in the record, does not show that his memory has failed. His own evidence is that he has been thinking the matter over since the other trial, and that he has become satisfied, or is of the opinion, that he was mistaken on the former trial.

It is also asserted that the facts clearly indicate that the witness has been tampered with by the defendants with a view of obstructing the course of justice. We do not think the record bears out this assertion; but, if it did, it would not alter the situation as to the admissibility of his testimony taken on the first trial. The jury could not have rendered a verdict, as before shown, against the defendants upon evidence not given on the trial, and especially upon the testi-

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mony of a witness shown upon the present trial to have been open to corruption and corrupted.

The judgment of the court below must be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JUNIUS E. BEAL AND PHOEBE B. BEAL, EXECUTORS, ETC., v. JAMES M. CONGDON ET AL.

Fraud—Bill to restore discharged mortgage—Evidence—Laches.

1. A party defrauded must be vigilant in protecting himself, and prompt in complaining.
2. It would be contrary to all rules of propriety to assume, without proof, the existence of fraud, when if it existed it could be proved by a witness put on the stand as reliable by complainants, and not asked about it.
3. In this case, upon a review of the testimony, the fraud charged is held not established, and the decree below dismissing complainants' bill is affirmed; SHERWOOD, C. J., dissenting.

Appeal from Washtenaw. (Joslin, J.) Argued April 10, 1889. Decided June 7, 1889.

Bill to restore into validity a discharged mortgage, on the ground that the discharge was procured by fraud. Complainants appeal from decree dismissing bill. Affirmed. The facts are stated in the opinion.

Sawyer & Knowlton, for complainants.

M. J. Lehman, for defendant Weaver.

D. B. Taylor, for defendants James M. and Sarah E. Congdon, Bacon, and Whipple.

G. W. Turnbull (*Edwin F. Conely,* of counsel), for

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defendants Thomas and Roxa M. Wilkinson, Stedman, French, Cassidy, and Steinbach.

CAMPBELL, J. The bill in this cause was filed in the circuit court for the county of Washtenaw to restore into validity a discharged mortgage, on the ground that the discharge was procured by fraud. The case made by the bill, so far as necessary to explain the issues, was this:

In January, 1880, James M. Congdon and his wife, Sarah E. Congdon, gave to Rice A. Beal a mortgage to secure $7,350, and interest, in a note given by James M. Congdon. This mortgage covered 305 acres of land in the township of Sylvan, in Washtenaw county, some adjoining and near Chelsea, and the remainder in the same vicinity, but not joining the rest. There were eight different descriptions, lying as nearly as can be drawn from the bill, in three groups.

In February, 1882, Congdon and wife conveyed to defendant Roxa M. Wilkinson a single parcel lying north of the territorial road, and west of the highway leading to Chelsea. The size of this and its value do not appear, as the conveyances are merely recited in a stipulation. On the same day, Congdon and wife conveyed to Thomas Wilkinson all of the remaining parcels. Each of these deeds was made subject to the Beal mortgage, which the grantees were to agree to see paid. Among the mortgaged lands were the west half of the north-west quarter of section 14, and the south 60 acres of the east half of the north-east quarter of section 15 which were contiguous parcels separate from all the rest, and containing 140 acres, which will be material to this controversy as the lands sold to Bierce.

In September, 1882, and May, 1883, Rice A. Beal released two parcels of land from the mortgage.

He died in October, 1883, leaving his wife and adopted son his executors.

In November, 1883, Wilkinson paid Beal $400.

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In December, 1883, the transactions began which have led to this dispute. In that month Thomas Wilkinson sold and conveyed to defendant George E. Bierce the 140 acres before referred to for a nominal sum of $4,900. Bierce gave back a mortgage of $2,500, to stand as the first mortgage. He gave, also, a mortgage for $1,750 to Wilkinson, to stand as a second mortgage. There is some dispute about the remaining $650, but it appears to have been arranged by notes not secured by mortgage.

At this time Wilkinson paid complainant Junius E. Beal $1,500 in money, and assigned to him the mortgage for $2,500 given by Bierce on the 140 acres. Beal indorsed $4,000 on the Congdon mortgage, and released the 140 acres from the Congdon mortgage, retaining the $2,500 security given by Bierce on the same land. This transaction is relied on as fraudulently managed by Wilkinson.

On the twenty-sixth of August, 1884, Thomas Wilkinson paid Junius Beal the remainder of the Congdon mortgage, being $4,188.35, and Beal discharged it in full of record.

In May, 1885, complainants filed this bill, claiming that they were defrauded into taking the $2,500 as so much payment, and asking to have the Congdon mortgage reinstated and set in force to that amount.

The money which constituted the final payment of $4,188.35 was borrowed, and was secured by mortgages,—one to defendant Cassidy for $3,000, and the other to defendant Mary L. French. Some parcels of land have also been sold to purchasers.

The bill relies upon fraud, which is substantially set forth in this wise: The 140 acres deeded to Bierce are alleged to be of small value, and no security for $2,500. The bill claims that Thomas Wilkinson went through a sham sale with Bierce to create a fictitious idea of the value of the land, and caused Junius Beal to believe the property was worth the amount of $4,900, named in the deed to Bierce; that, by this

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means, Junius Beal was induced to take the $2,500 mortgage as collateral to the Congdon mortgage, and release the 140 acres from the latter; that in August, 1884, by keeping up the same fraudulent show, Beal was induced to discharge the entire Congdon mortgage, and accept the $2,500 as payment, instead of holding it as collateral. The fraud is sought to be made out by showing Bierce's financial condition, and his version of the sale to him, and by showing the character of the 140 acres as land of no value.

The court below dismissed the bill, and complainants appeal.

There is a good deal of conflict in the testimony. The bill is not, as strictly it should have been, sworn to; and it is not drawn upon the same theory in all respects which is now relied on, but complainants claim there is no absolute variance, or, at least, none precluding relief. We are not told on what grounds the bill was dismissed; but the testimony is, in important respects, so discordant as to raise issues of fact, on which, according to the rules of pleading and evidence, complainants had the burden of proof laid on them.

It is evident from the face of the bill that, on its theory, there could have been no fraud committed in December, 1883. By that transaction, as claimants claim it to have been, complainants received absolute payment of $1,500, which they now claim was more than the 140 acres were worth, and at the same time received a mortgage for $2,500 on the same land which was released, and which they claim was much more than its value. If this mortgage was held as collateral, instead of losing anything by the release, they were at least $1,500 better off for making it. And they do not claim that, at this time, anything was said concerning a future release of the balance of the Congdon mortgage, which, according to this theory, was still in force to the amount of $6 500. And, yet, the whole theory of the bill is that this sham sale was left working on the mind of Junius Beal until eight months

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thereafter, in August, 1884, when it was used by direct representation and urgency to induce him to discharge the entire Congdon mortgage of $6,500, and take the $2,500 mortgage as so much cash on that occasion. This theory postpones the commission of the fraud for eight months, and renders the delay in filing the bill in May, 1885, nine months instead of seventeen months after the fraud.

As a matter of fact, which is left beyond dispute by the documents (although Mr. Beal swears that he did it under a mistake almost at once discovered), the assignment of the $2,500 mortgage to Mr. Beal, in December, 1883, was accepted as equivalent to a cash payment, and the Congdon mortgage was indorsed down by the whole payment of $4,000, leaving only about the same amount thereafter payable. If there was any fraud, it was then, and not afterwards. When the payment in full was made, in August, 1884, there is no evidence showing any fraud or any occasion for fraud. Wilkinson paid all that was due on the Congdon mortgage as a matter of right, and it was discharged at once as a matter of course.

This entirely changes the theory of the bill, and does so in such a manner as to very seriously affect the equities. If the $2,500 mortgage was intended as collateral security, and not payment, and the indorsement of it as payment was a mistake, Beal testifies that he at once discovered it, and never at any time thereafter complained of it, or even referred to it when he made a discharge in full of the Congdon mortgage, in August, 1884, when he took the final and decisive step, and when there is no proof that he was deceived or cajoled into accepting the mortgage then for the first time as a payment. At that time the money payment was treated by every one as all that was due. It is clear to our minds that the case made by the bill is not proved.

But, upon the theory that there was fraud in getting the

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$2,500 allowed as payment in the first place, if we can consider it as before us in proper shape, it is necessary to examine carefully the precise question presented, and that is whether complainants were fraudulently misled by Wilkinson to their injury. And this requires—

1. Fraudulent deception.
2. The acceptance of a security which is not worth what it purported to be worth.

A third condition also must not be overlooked, which is that a party defrauded must be vigilant in protecting himself, and prompt in complaining.

In the present case, while Mr. Beal's testimony as first given is to the effect that he supposed the $2,500 was to be merely collateral, he also admits that he discovered almost immediately that the papers all made of it an absolute payment, and further that he never at any time attempted to have the mistake, if it was one, rectified. But, as already suggested, there was no reason for being particular about this arrangement, or hesitating to release the 140 acres, if it was not a payment. As a matter of fact, it cannot be doubted on this record that the mortgage was actually received as a payment for its face, and when the payment of the remainder of the Congdon mortgage was made, in August, 1884, no one disputed that it had been reduced to that extent.

Whether any fraud was committed in getting Mr. Beal to receive the $2,500 in payment is the question that complainants' counsel have been led to argue as the chief question in the case. Upon this it appears beyond controversy that Junius E. Beal refused to rely on the representations of Wilkinson, express or implied, and insisted on having the propriety of accepting the proposed arrangement determined by an examination to be made by his uncle, Eugene E. Beal; and it was accepted on his approval. There is some allegation bearing on some supposed misleading of Eugene E. Beal But, if any such thing took place, which is denied, it devolved

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on complainants to show it. It appears from the record that Eugene E. Beal was living, and accessible as a witness. He was actually put on the stand by complainants to impeach Wilkinson as to some particular remarks which he denied to have been made. But, although on the stand, he was not asked by complainants any question whatever as to his examination of the premises, and its circumstances. It would be contrary to all rules of propriety to assume, without proof, the existence of fraud, when if it existed it could be proved by a living witness put on the stand as reliable by complainants, and not asked about it.

Whatever may have been the occasion or purpose of the sale to Bierce, whose testimony does not seem very convincing, the only pertinent inquiry concerning the 140 acres is as to the value of the $2,500 mortgage, and whether it was so grossly deficient as to make fraud certain. Even if the approval of Eugene E. Beal should not be absolutely conclusive, there is very strong evidence that the land was more valuable; and, had complaint been made promptly and consistently, it is not clear that a case would be made out against the original parties, while now the honest claims of others stand in the way. As the case is now presented, and with an entire failure to examine Eugene Beal on what was, if true, within his personal knowledge, we are not disposed to question the correctness of the decree below as against complainant; and, as defendants do not appeal, the decree will be affirmed, with costs.

CHAMPLIN and MORSE, JJ., concurred with CAMPBELL, J.

SHERWOOD, C. J. I think the complainants were entitled to the relief prayed for in the bill, and that the defendants were guilty of the fraud charged, and that the decree should be reversed.

LONG, J., did not sit.

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EDITH LENDBERG, ADMINISTRATRIX, v. THE BROTHERTON IRON MINING COMPANY.

Negligence—Statements of party as to cause of injury—Trial—Burden of proof—Province of jury—Reading law reports—Charge of court.

1. The statement of a party as to the cause of an injury resulting in his death, not made at the time of the accident, nor necessary or pertinent for medical treatment, is inadmissible as evidence.
2. A plaintiff has always the burden of showing his cause of action, and a defendant is entitled to go free unless made answerable by legal testimony. There are no presumptions against him, and, if there is no such testimony to be found, it is not admissible to make out a case without it.
3. Jurors cannot be allowed to intervene as interpreters of witnesses, and whatever goes to the jury must go to *all* through the same medium.
4. Whatever difficulties arise on a trial in getting testimony out of ignorant or stubborn witnesses can be best dealt with by leaving all parties to the usual methods.
5. It is no more correct for the court than for counsel to read law reports to the jury.
6. Precedents are for the use of courts, who are supposed competent to extract principles, and not for juries, who cannot be expected to discriminate in their use.
7. It is the office of a trial court to formulate the legal rules to guide the jury in the case before them with as little extraneous combination as possible.
8. The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called on to decide.

Error to Gogebic. (Williams, J.) Argued April 9, 1889. Decided June 7, 1889.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

M. M. Riley and *F. F. Kutts* (*Hayden & Young*, of counsel), for appellant.

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Charles F. Button (*Frank E. Robson*, of counsel), for plaintiff.

CAMPBELL, J. This suit is brought to recover damages for the death of John Lendberg, who was employed in defendant's mine in Gogebic county, and who was accidentally killed February 22, 1887, under these circumstances:

Defendant had let a contract to certain parties to sink a shaft from a level some 50 feet from the surface, down to which another shaft already existed. The work was not carried on from the surface, but the new shaft was started at the level, and had been sunk 25 or 30 feet. A windlass was rigged on a platform across the opening on the level, and the rock was brought up in a bucket to this point, and removed along the drift. About six feet below the windlass a pump was set on timbers at one side of the shaft, with a plank for the pump man to stand on, reached by a short ladder from the level. The bucket was raised and lowered in the shaft so as not to come in contact with the pump-stand. Lendberg was employed by defendant, and it was his duty to go down and oil the pump, and see that it was in order, at the times when the miners changed work and went to their meals. Except at these times he was not required to go down, unless some occasion called for it; and the miners were expected to see to the pump while they were at work in the shaft.

The bucket for raising rock was attached by a hook to a rope, which was worked by the windlass, and was an inch and a half in diameter. It is claimed the defendant, which furnished this rigging for the use of the contractors, was liable for its having been allowed to get worn or cut by the hook, and the only negligence relied on was the condition of this rope. The theory of plaintiff—which is not very clearly set out in the declaration—was that this rope was kept in use when defendant had been made aware of its condition, and that while Lendberg was at the pump-stand, and a

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bucket was being hoisted up to the windlass, the rope broke, and the bucket struck and broke the plank on which Lendberg stood, and he was thrown into the shaft, and fell on the bucket, and was so injured that he died.

It appeared that on the morning of February 22, 1887, about 8 o'clock, he was drawn up out of the shaft in the bucket, and was taken home, and died in twelve or thirteen hours. Evidence was received against objection that some time during the interval he told that the bucket fell by reason of the rope breaking, and broke the plank, and that he fell on top of the bucket. Except for this testimony there was no testimony except hearsay as to the cause or manner of his death. No eye-witness was sworn who saw the transaction. If it happened as charged, there were men at the windlass who must have known when the rope broke, and men in the shaft who loaded the bucket, and who would have been in peril from the fall of the bucket from overhead. These men were the contractors who had charge of all but the pump, and who could not have been unknown. Some of them were sworn, but none who were at the place when Lendberg was injured.

It is claimed by defendant that the manner and cause of his death do not in any responsible way appear, and that there was nothing from which the jury could properly have been allowed to find plaintiff's case made out. As this general failure of proof is relied upon as emphatically as the specific errors of less comprehensive bearing, a reference to the circumstances will be proper in the beginning.

The work being let by contract, the defendant had no control of the shaft-sinking beyond such oversight as would see that it was properly placed. This would cease as soon as the shaft had been fairly started; and the case shows that at the time of the accident the contractors had charge of all the mining operations, being furnished with the hoisting apparatus, which they ran themselves, and running the pump,

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except as it required at intervals Lendberg's attention. The bucket, when loaded, weighed not over 200 pounds, and the rope was an inch and a half in diameter, and had not been used long. There were certain persons occupying subordinate positions in the mine, known as "shift bosses," who, under direction of the mining captain, visited various places in the mine to answer calls for what might be needed, and, in the case of miners employed on wages in the ordinary way, to see that their work was attended to. In the case of contract work they did not interfere under ordinary circumstances.

A witness named Lake, who was one of the contractors, said that about 4 in the morning of February 22, 1887, Mr. Harris, who was the shift boss during that period of the day in this part of the mine, was at the place where Lake and his company were employed, and Lake showed him that the eye of the hook—which he says was of square iron—had worn in from a quarter to half an inch, and that there should be a different hook obtained. According to his story, Harris recognized the fact, and said that the blacksmith should have one made. In the meantime he told Lake to fix the rope himself, which all of the testimony shows could have been done by drawing the rope through further, so as to have a sound part in the eye of the hook. All the witnesses examined on the subject show that it was the business of the persons using the bucket and tackle to attend to this themselves, and it was manifestly a very simple matter,—within any one's comprehension.

The court below rightly held that, if this accident arose from carelessness of these mining people, it was one of the risks which defendant could not be held liable for.

The testimony shows that blacksmith work was only done during daylight, and that a new hook could not have been made before Lendberg was injured. As Lake understood perfectly the condition of the rope and hook, according to

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his own story, the continued use of it in that condition was, if negligent at all, the negligence of himself and his associates. If he and they chose to use it as it was, instead of taking the small trouble of shifting the knot, which they should have done, and probably would have done if it was seriously thought there was any danger, they alone were to blame for it. What Harris suggested, as repeated by Lake, was a common-sense suggestion, which would have avoided all danger, and was for the contractors to attend to if they desired any safer method. It was denied by Harris, and he was somewhat corroborated, that any such interview took place. And it is also worthy of notice that Lake's testimony was so unintelligible in places as to call forth remarks from jurors, who seem to have understood Swedish as well as English, to the effect that his language was not correctly rendered.

If Lendberg was hurt as claimed, there was no negligence of defendant responsible for it. Harris, who is the only person claimed to represent defendant, and it is not necessary to consider how far he did so, gave proper directions in the matter, and the fault for not following them was with the contractors.

But the position is also well taken that there was no legal evidence which connected the injury with any defect in the rope. All there is to show it is found in the statement by hearsay of what Lendberg said about it at some time before he died. It was not a statement or exclamation at the time of the injury, and it was not necessary or pertinent for medical treatment. There is no authority for allowing such statements of a past transaction, by persons not witnesses, any weight as testimony. If Lendberg made any such statement, there is much in the facts to indicate that he could not have been in a position to be sure of anything more than the fact of his sudden fall. He was senseless for some time when brought up, and would not have been likely to know just what the difficulty was. But, however this may be, no

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one else gave any such testimony. Lake and some others undertook to give the same version, but none of them were eye-witnesses. All that is sworn to by any eye-witness is that Lendberg was drawn up out of the shaft in the same bucket, and with the same rope. No one saw it broken, and no one saw it repaired. If the rope broke, and let the bucket fall on the pump-stand, as that was within six feet of the top, the rope must have broken close to the windlass. How it got down to the bottom of the shaft, and was so speedily tied that Lendberg was brought up almost, if not quite, immediately, is not explained. But no reason is given why the persons in charge of the windlass, and those who escaped death in the shaft when the rope broke, were not examined. The bucket must have been emptied before Lendberg could be put in it. The very short time stated by the witness to have elapsed during his absence seems very inadequate to account for all that must have taken place if plaintiff's theory is true. Beyond the fact sworn to that Lendberg was seen drawn up, and was probably thrown down in some way upon the bucket, there is nothing but mere conjecture. The cause and circumstances remain entirely unexplained.

A plaintiff has always the burden of showing his cause of action. Every defendant is entitled to go clear unless made answerable by legal testimony. There are no presumptions against him. If there is no testimony to be found, it is not admissible to make out a case without it. When plaintiff's case was closed, no cause of action had been made out, and the request that the court should so hold should have been granted. The testimony for the defense, if believed, showed there was no cause of action, and the short rebutting testimony did not remove the difficulty, and the court was again asked to hold that no case had been made out, and that a verdict should be rendered for the defendant.

It seems to us that there was no case for the jury, and the judgment cannot be sustained. Neither do we see any reason

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why another trial should be gone into, since the defendant is not at fault for the use of the rope and bucket if they were improperly used at the time in question. But the form of granting a new trial seems appropriate.

There is much in the record which, as it stands, indicates difficulties on the trial which could hardly have failed to do mischief. Intentionally, or quite as probably through ignorance, witnesses evaded answering questions, and gave answers not proper or called for. The record does not show just when and how interpreters intervened, but it does show that for want of interpreting, and, once or twice at least, for want of competent interpreting, some members of the jury got ideas which were not open to the rest, unless they took them from their fellows, which would not be allowable. Jurors cannot be allowed to intervene as interpreters of witnesses, and whatever goes to the jury must go to all through the same medium. This same difficulty seems to have led the trial judge to intervene with questions which interfered with the action of counsel, and which, especially during cross-examination, interfered with his rights. The record does not disclose a very orderly trial, and whatever difficulties arise in getting testimony out of ignorant or stubborn witnesses can be best dealt with by leaving all parties to the usual methods.

Complaint is made of the charge in various particulars, but reference will not be made to all. We think it was not proper for the court to read to the jury the full report of the case of *Swoboda v. Ward*, 40 Mich. 420. It is no more correct for the court than for counsel to read law reports to a jury. There are in all reports discussions which may include references to facts real or supposed, and law questions in or out of the record, which cannot be taken literally and just as they stand as guides to a jury in some other case, and with different facts. Between this case and that there are very serious differences as to the alleged cause and manner of the accident, and the supposed duty and negligence, that need

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not be dwelt upon, because the citation would have been improper in the way resorted to in any case. Precedents are for the use of courts, who are supposed competent to extract their principles, and not for juries, who cannot be expected to discriminate in their use. It is the office of a trial court to formulate the legal rules to guide the jury in the case before them with as little extraneous combination as possible. The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called on to decide.

There is also some force in the claim that the language of the court under the circumstances of the case had a tendency to prejudice defendant's witnesses, by dwelling repeatedly on the cases where one witness is contradicted by more than one, and yet is to be believed. Among other things, the jury were told:

"If five or six men should come on the stand and swear that the moon was made of green cheese, and one should swear that it wasn't, you wouldn't be compelled to believe it. If a dozen men should come on the stand and swear that the sun rose in the west, instead of the east, you wouldn't be called on to believe it."

So far as the record shows, the questions on which the witnesses differed were not matters out of the ordinary course of things, but ordinary matters of fact, and intrinsically no more impossible or improbable on the one side than on the other. At the same time the only such controversies in the record were between one witness for plaintiff and more witnesses for the defense. While there is no reason to doubt the entire fairness of the judge in his purposes, we cannot but see that there is danger in bringing in such warnings and comparisons as would have a not unnatural tendency to lead a jury to dangerous inferences.

We do not think it necessary to discuss other questions and rulings, inasmuch as the case is fatally defective as it stands, upon the grounds mentioned.

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Judgment must be reversed, with costs, and a new trial granted.

SHERWOOD, C. J., and CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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EMMA WILLIAMS v. JOHN C. EDMUNDS.

Negligence—Careless driving—Master and servant—Evidence—General reputation—Charge to jury—Contributory negligence.

1. In a suit for damages for injuries claimed to have been received by reason of the careless and reckless driving of defendant's servant, his condition as to being drunk or sober at or about the time of the accident is a proper subject of inquiry.
2. In such a case the general character of the servant for sobriety is not in issue, and cannot be shown any more than his general character and reputation as a careful driver.
3. An instruction to a jury in a negligence case that, if the plaintiff was guilty of that negligence without which the accident would not have occurred, she cannot recover, but if the defendant's servant *alone* was negligent, and *his* negligence occasioned the injury, she could recover, is equivalent to an instruction that the plaintiff must show that the *sole proximate* cause of the accident was the negligence of such servant.

Error to Wayne. (Hosmer, J.) Argued April 11, 1889. Decided June 7, 1889.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

F. A. Baker, for appellant.

Gurney & Lowrie (*James H. Pound*, of counsel), for plaintiff.

MORSE, J. The defendant is the proprietor of a livery stable in the city of Detroit.

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On the twenty-fourth day of December, 1886, one of his carriages, driven by Daniel Sullivan, an employé, ran over the plaintiff at a street crossing at the corner of the Campus Martius and Monroe avenue, severely injuring her.

The substantial ground of complaint in the plaintiff's declaration was that the defendant, by his servant Sullivan, so carelessly, rapidly, and improperly drove, governed, and directed his carriage and horses, that by and through the carelessness, negligence, and improper conduct of the defendant, by his said servant, the said horses and carriage ran and struck the said plaintiff with great force and violence, whereby she was thrown with great force and violence to the ground; that the defendant, by his said servant, was negligent in this, to wit:

"That by and through his said servant he recklessly and carelessly drove said horses at a high rate of speed, and did not exercise due care and caution towards the safety and rights of pedestrians and others in crossing the cross-walk whereon said plaintiff was crossing said avenue or street, and failed and neglected to keep said horses under control, so that they could be promptly checked and stopped so as to avoid running against and upon the plaintiff and other pedestrians.

"By means of the said several premises aforesaid the said plaintiff was then and there greatly bruised," etc.

The plaintiff recovered a judgment of $3,500 in the Wayne circuit court, which, upon a motion for new trial, was subsequently reduced to $3,000.

The plaintiff claimed that between the hours of 5 and 6 o'clock P. M., as she was, with due care and caution, crossing the street, and when she was on the crossing, about midway between the sidewalk and the street-car track, she was knocked down and run over by the horses and carriage of the defendant.

"I was knocked down by horses coming fast. I did not see the horses before they struck me. I was right between the horses before ever I saw them. I was knocked so quick I hadn't time to think or scream, or anything else."

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The horses stepped upon her, and one or more of the carriage wheels ran over her. She testified that she looked up and down the street before crossing, and saw no team coming.

"It was getting kind of dark. I don't think it was real dark. The lights were lit. I could see quite a ways around me; I don't know how far. I didn't dodge at all. I had no time. I was right between the horses before I noticed them."

Henry Yost, and his daughter Maud, 14 years old, saw the occurrence, as did also a boy, Bennie Binberg, of the same age as Maud.

Yost was going towards the team, but he did not see them until they were within a few feet of plaintiff. He thought the horses were going at the rate of 10 miles an hour, and that they did not stop after the accident, and kept up about the same motion until they passed out of his sight. His daughter corroborated him.

Bennie Binberg testified that the horses were going at a very rapid rate. He did not see the driver hold them up before or when he came to the crossing.

"I don't remember whether he slackened the horses or not after they had run over her."

Sullivan, the driver of the carriage, testified that, obeying the instructions from the livery office, he drove that afternoon over to Gratiot street for Mr. Penniman to take him to the Michigan Central depot. He drove down Farmer street to Monroe avenue, and came down that avenue at a regular gait.

"When I was coming towards the crossing about the length of the carriage I pulled up my team nearly to a walk, and there was a large crowd on the cross-walk, passing,—six or seven persons. The street was very crowded that night.

"When I came up to the cross-walk this woman was passing me,—was past me some two or three feet, and she looked around, and she jumped right back again. Of course, I had no power in a moment. Then, when I saw her jump back,

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I turned the team towards the street-car track. I turned them right around, and then I stopped my team, and I shoved down.

"There was a furniture wagon on Monroe avenue standing, and that furniture wagon came to the curb-stone, so I stopped my team, and I then was shoved down. There was a lot of rigs passing,—coupes and carriages and everything, —and I went down as far as Woodward avenue, and a man with a cutter came up to me. He asked my name, so I gave him my name, and gave him Mr. Edmunds' name, and then I drove to the depot."

He was arrested as he was returning to the livery barn, going back the way he came.

Mr. Penniman, who was inside the carriage, testified that he felt the horses slowing up. It was a close carriage, and when the carriage was nearly standing still he heard some one scream.

"The driver swung his horses right around the other way to the left, and I opened the door to look out, because the horses were turned around, so I could see out that door, and I saw a crowd there, and something on the ground. I was going to get out, and there was a crowd there, and I said, 'Go on to the depot.'"

Upon the trial the defendant offered testimony tending to show that Sullivan was not addicted to the use of intoxicating liquors, and what his reputation was as to his being a reckless and careless driver, or a good, faithful driver.

This proposed evidence was excluded.

The defendant's counsel in this Court does not attempt to claim that he was entitled to show the reputation of Sullivan as a driver, but he argues that he ought to have been permitted to show that the driver was a temperate man, and not in the habit of using intoxicating liquors.

He bases his argument on the fact that the officer who arrested Sullivan as he was driving back from the depot was allowed to testify, as were others, that he was under the influence of liquor.

The defendant was permitted in rebuttal of this evidence

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to show that Sullivan was not intoxicated or under the influence of liquor at the time the plaintiff's witnesses testified he was. Sullivan also testified that he had not been drinking that day, and that he was not in the habit of drinking or getting drunk.

We think the condition of the driver, as to being drunk or sober at the time or about the time of this accident, was a proper subject of investigation, being part of the *res gestæ*

It was not, however, necessary or material to go further into the question of what his habit was as to the use of intoxicating liquors, or whether or not he was a temperate man in the opinion of other people. It would have raised a collateral issue, the determination of which would have had but slight, if any, bearing upon the question at issue in the case.

We do not think his general character for sobriety was in issue or admissible any more than was his general character and reputation as a careful driver. The jury were only concerned with his condition and manner of driving on the day in question at the time of the injury to plaintiff. *Fahey v. Crotty*, 63 Mich. 387 (29 N. W. Rep. 876); *Heland v. Lowell*, 3 Allen, 407; *McCarty v. Leary*, 118 Mass. 509.

Dr. McLean and Dr. Richards were sent by the defendant, at one time to examine plaintiff, and ascertain the nature and extent of her injuries. She declined to submit to an examination. Defendant's counsel claims that he was not permitted to show what took place, and what was said between the doctors and the plaintiff. An examination of the record shows that the court did at first exclude this testimony, but afterwards Dr. Richards was permitted to state what was said and done there without objection.

The court instructed the jury upon the matter of the contributory negligence of the plaintiff, as follows:

"If you find that the plaintiff contributed in any way to this accident, that her negligence was the proximate cause—when I use the words 'proximate cause,'—because

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the counsel have requested me to charge you that she must recover if the defendant's servant was negligent, unless her negligence was the proximate cause,—when I say the proximate cause, I mean contributed directly to the injury.

"If she was guilty of that negligence *without which the accident would not have occurred*, why, then, of course, she cannot recover. If she is negligent, or if she contributed to this accident by her negligence, why, then, of course, she cannot recover; but if the defendant's servant or driver, Mr. Sullivan, *alone was negligent*, and his negligence occasioned this injury, then she is entitled to recover such damages as I shall hereafter call your attention to."

The defendant's counsel objects to this charge as not being clear and distinct, and that it, in effect, instructed the jury that the plaintiff might recover unless the plaintiff's negligence was the sole proximate cause of the accident.

The charge is not open to this construction. When the court instructed the jury in the language that I have italicized, that the plaintiff must show that Mr. Sullivan "alone was negligent," and that if she was "guilty of that negligence without which the accident would not have occurred," it seems to me that the jury were clearly instructed that the plaintiff must show that the sole proximate cause of the accident was the negligence of the defendant's servant. If the plaintiff made such a case that the jury were satisfied that no act of hers contributed to this accident, and that no omission on her part to act caused it, it was certainly sufficient; and if any acts of hers could be said to have contributed to the injury, or any failure of hers to do what she ought to have done, then, without those acts or any of them, or if she had done what she ought to have done under the circumstances, the injury certainly would not have happened. If she was careless in any respect, she could contribute by such carelessness to the injury, but, if she was not careless in any way, she could not contribute to it.

If she did nothing that helped on this accident, either by commission or omission, she could not be guilty of contribut-

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ing to it, nor be said to have done any act that contributed to the proximate cause of the injury.

Suppose, in this case, that it was true that, as the defendant's servant neared the crossing, the plaintiff had passed two or three feet, as Sullivan testifies, beyond the team on the crossing, and she jumped back, as he says, in front of the team, and this should have been found as negligence on her part. The accident in that case would not have happened if she had not jumped back, no matter how careless Sullivan might have been in his approach to the crossing. If she did jump back, and that act of hers was carelessness, then Sullivan might also have been careless, and the carelessness of each would have contributed to the accident. It seems to me that her negligence, in order to have contributed to the accident, must have been some act or acts of hers, or omission to act on her part, without which, as in the language of the trial judge, the accident would not have occurred.

If she could not have saved herself by any act which she might have done under the circumstances, it is difficult to perceive why she should be chargeable with negligence for not doing that which, if she had done it, would not have prevented the accident.

And the converse of the proposition is also true that if, under the circumstances, she could not have saved herself by omitting to do anything which she did do, then she ought not to be charged with negligence for doing anything which, if she had not done it, would not in any way have prevented the accident or lessened her injuries. In other words, if she could not have prevented the accident or lessened the injury by anything she might have done that she did not do, or by failing to do anything that she did do, she cannot be considered guilty of negligence.

The defendant's counsel also requested the court to instruct the jury as follows:

"Under the evidence in this case, the plaintiff cannot

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recover, unless you find that the team in question was driven too rapidly as it approached the crossing where the accident occurred."

This was not given as requested. We think it was properly refused.

If the defendant's servant did not drive too rapidly, there was yet evidence in the case to go to the jury tending to show him to have been negligent in the management and control of his team.

The counsel also insists that plaintiff could not recover in this action, under the declaration and proofs, for the washing done for her by her sister, which she was unable to do for herself.

Certainly the loss of her services—her inability to do her own and usual work on account of this accident—was competent to be shown in damages, if properly pleaded. The allegation that she "was hindered and prevented from transacting her lawful affairs and business" would seem to cover it, as it may be inferred, I think, that this woman, if able, would do her own washing. The testimony shows that she did do it before the accident. The court charged the jury, her sister having done it for her since her injury, that if her sister did it as a mere gratuity, on account of her relation to and friendship for plaintiff, and without hope of reward, as an act of kindness, it could not be recovered for in this action, but, if the sister did such washing with the hope of reward, it could be considered as a legitimate claim against the defendant, and as part of the damages to be estimated in arriving at the amount of the verdict.

It is claimed that the court did not permit the jury to consider in mitigation of damages what the plaintiff had received from the defendant. We find this claim to be erroneous. Defendant had paid various expenses attending plaintiff's illness from her injury, and obligated himself to pay some physicians' bills. The amount paid out was shown

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to have been about $260. The court plainly informed the jury that this amount must be deducted from the whole amount found to be due the plaintiff for damages, and no claim was made or allowed upon the trial for the bills of physicians that defendant had agreed to pay.

We find no error in the case, and the judgment must be affirmed, with costs.

The other Justices concurred.

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THE ALDINE PRESS v. JAMES D. ESTES.

Contract—Order for goods—Notice of countermand—Directing verdict for plaintiff.

1. The chief contest in this case was whether any binding contract existed between the parties, and, on a review of the testimony, *held*, that the case should have been submitted to the jury.
2. Where the court directs a verdict for a plaintiff, he must make out on the record a case that has no matter of fact left open.
3. Until a written contract becomes complete by the signatures of both parties agreeing to the same thing no one is bound, and the negotiations are open to proof.
4. A notice of the countermand of an order for printed matter by a publisher, pursuant to a right reserved in the order in case of a sale of his paper by a given date, given on the supposition that such sale had been made, but which failed for want of a legal formality, and which notified the other party to incur no expenses, is sufficient to end the arrangement.

Error to Clinton. (Smith, J.) Argued April 17, 1889. Decided June 7, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Auten & Moss, for appellant.

O. L. Spaulding, for plaintiff.

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CAMPBELL, J. Plaintiff, which is presumably a corporation, having its business office in New York, sued defendant, who was a publisher of a paper in St. Johns, for the price of 1,500 annuals or calendars for the year 1888, alleged to have been ordered in 1887. The suit was brought before a justice, and defendant prevailed. Upon appeal at the Clinton circuit, the judge who presided at the trial ordered a judgment for $96.40.

The bill of particulars filed with the justice claimed for—

"1,500 sheets and covers of the Aldine Press octavo annual for year 1888, as shown in order to W. W. Huntington, secretary and treasurer, Oct. 13, 1887, $90."

Precisely how this sum of $96.40, as of December 18, 1888, was made up, does not appear. If the articles were to cost $90, the payment was not due till January 9, 1888, and the amount with interest would fall somewhat short of that amount. But the order, which gave $90 as the price by catalogue of 1,500 copies, also gave a reduction of $18, which, as far as we can gather from the language, was a rebate on account of one page of advertisements to be supplied by plaintiff, leaving the amount which defendant was to pay, as set out in the order, $72. The order is express in fixing $72 as the sum to be paid, and there is nothing in the record to explain it, if the order was relied on.

But, when plaintiff introduced testimony, the proof offered was furnishing 1,500 annuals, which were sworn to be worth $90; and there was reference made by the witness to a page advertisement sent to defendant, with no further explanation, so far as appears. As no error was specifically assigned on the correctness of the amount, if any recovery was to be had, it is possible there was some reason for disregarding the $18 which we know nothing of. It is one of the ambiguities in the case that obscure the facts.

The chief contest was whether any binding contract existed at all. The evidence indicates these facts:

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On October 13, 1887, some one purporting to be an agent of plaintiff, whose name does not appear in the record, and who was not sworn in the cause, applied to defendant, then publisher of the Clinton Independent, to have him purchase such number as he should wish of the annual for 1888, then kept on sale by plaintiff. This annual had blanks upon the title-page, which could be filled in with the name of any paper or publisher, the object being to make it appear as published by the person whose name should be inserted, so as to be his annual. The agent presented a note-sheet having printed on it a title-page which was a sample of the proposed title, with blanks for the name of the publisher and his paper. On the second page was a price-list of the annual in sheets, in lots from 500 to 3,000, at prices reduced somewhat for the larger quantities, and with prices also, separately, for illuminated covers. In this price-list the customer was to put in his own imprint on the illuminated cover, but the blank order appended required plaintiff to do it without charge on the title-page. Above the price-list was a printed notice to this effect:

1. That the order when signed was only a business letter, and not a contract.
2. It was meant to set forth all offered and expected, so as to prevent misunderstanding.
3. That all orders were solicited subject to acceptance in New York city on the face, as written.
4. That no one outside of the office was authorized to verbally or otherwise change, modify, or in any way affect the writing, which was the only thing considered and acted on in New York.
5. All payments must be made to the order of plaintiff, or its named secretary and treasurer.

This printed order, which had no written filling except the number of copies and the date for sending three blank dummies for use in canvassing, and the date of payment of draft, was to this effect: It ordered 1,500 sheets of the annual and 1,500 covers,—the latter with blanks for such matter as

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defendant might put in for imprint or otherwise,—at a sum of $90, less $18 for the advertising page before referred to, with three dummies, which were to be sent about October 25. Then followed certain conditions to be binding on plaintiff if the order was accepted, partly concerning the style, and precluding plaintiff from supplying any one in St. Johns with the annual, except defendant. Then followed this sentence in writing:

"Privilege of countermand, in case I dispose of this paper, till December 1."

This order was signed by defendant. Near the place of signature was a small printed memorandum in red, warning against signing the order without reading the notice. Indorsed on this order was a printed direction signed by defendant, to forward the goods about December 5, and a printed memorandum that, if plaintiff wished to ship earlier for its own convenience, it might be done, but without hastening time of payment. On this order was stamped an acceptance October 18, signed by the secretary and treasurer, Mr. Huntington.

The plaintiff introduced one of its officers, Mr. Sutton, who testified that the order was received by mail at the New York office, and accepted October 18, 1887; that witness sent three dummies and notice of acceptance of the order by mail October 25, 1887, with a copy of a page advertisement. No copy of this letter of acceptance was shown in evidence. Witness said plaintiff never received any countermand. Defendant admitted receiving the dummies, but denied receiving notice of the acceptance, and received nothing but the dummies. The goods were sent from New York December 5, and reached St. Johns two days thereafter, but defendant refused to accept them.

The plaintiff's case depended entirely on the existence of a binding written contract, carried out by plaintiff according to

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its terms; and a *prima facie* case was made out when the testimony for plaintiff was in.

Defendant claimed the contract was never completed so as to make a valid agreement, and that before December 1, 1887, he countermanded his order. As the court left nothing to the jury, it was necessary for plaintiff to make out on the record a case that had no matter of fact left open.

The agent who saw defendant, as already stated, was not sworn, and his name does not appear in the record. But, as defendant's testimony given or offered must under such a ruling be held as true for the purposes of the trial, it is necessary to consider its purport. And from this, these facts appear:

The defendant never had in his possession, never read, and never had explained to him any part of the printed matter, and understood when he signed the order that it was subject to countermand at any time before December 1. He never received any notice of acceptance; and it appears, by necessary inference, that he never had in his possession anything showing either his own proposal, or the acceptance, and that the paper must have been forwarded to New York by the agent. While the court allowed defendant to show what he understood the order to be, testimony was ruled out to the effect that he was to have a right to countermand at any time before December 1, not only in case of sale of his paper, but also in case he failed to secure advertisements to be inserted in his annual. About the middle of November he sent a postal card to plaintiff countermanding his order. He also gave evidence of a complete parole bargain for the sale of his establishment before the time of rovocation, which was not legally binding on account of the statute of frauds, and which was not finally and legally closed until 1888.

The court refused to allow proof that plaintiff's agent in October, 1887, and after the agent had dealt with defendant, tried to get Mr. Fuller, another publisher in St. Johns, to

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purchase sheets of the annual, and, on Mr. Fuller's objecting to do so unless he could secure advertising, the agent replied, in effect, that he had already made an arrangement with defendant on those conditions, and it would do him no good.

We think the case involved matters which should have gone to the jury.

The defendant did not himself mail to the plaintiff the order in question. By the terms of the notice relied on by defendant the agent was not allowed to contract at all, and the plaintiff could only become bound by an agreement in writing signed by one of its officers. As the articles bargained for were worth more than $50, a contract to be valid must have been signed by plaintiff; and, by the terms of the same notice, the so-called "order" was to be treated as a mere business letter, in itself, binding no one.

If defendant's testimony received, or proposed, was true, the agent had no right to mail his order to New York, except on the understanding which he had with defendant. Until a written contract becomes complete by the signatures of both parties agreeing to the same thing no one is bound, and the negotiations are open to proof. If defendant's testimony is received, he never authorized any one to bind him by procuring the acceptance of this written offer except on condition of retaining a right of countermand; and, under the terms of the order itself, it would have been a fraud on defendant for the agent to forward his letter, and to open negotiations with another publisher at St. Johns to furnish him the same annual; and, until Fuller declined to purchase, the agent did not forward defendant's order.

The case, so far as these preliminaries are concerned, is open to the same considerations that were referred to in *Weiden v. Woodruff*, 38 Mich. 130, and *Eberts v. Selover*, 44 Id. 519 (7 N. W. Rep. 225). The testimony was not so much to vary a contract as to show that there never was any final

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contract. This is more important, because, while there is no testimony in the case showing just what information was sent to defendant as to the acceptance of his order, and he never had in his possession any contract which bound plaintiff, he had, according to his testimony, a right to expect such an acceptance or agreement as he had made a condition of bargain with the agent at St. Johns. And we are not prepared to say that, as the testimony was offered and in part received, it was not a question of fact whether he ever agreed to run the risk of being bound by the chances of the mail, without having given to him full means of proving the contract against plaintiff, and the latter failed to comply, or violated the conditions, as the agent attempted to violate them by dealing with Fuller before acting on defendant's order or forwarding it.

But, furthermore, it seems that defendant countermanded the order before the time arrived for carrying it out. This countermand sent by mail, whether received or not, stood at least on the same footing with the mailing of acceptance, which was not received. The right to countermand existed under the written order in case of sale of defendant's press. The agreement was not one which laid any burden on plaintiff until after December 1. If countermanded before that time, plaintiff would lose nothing, except a possible future sale for a future consideration. The purpose for which defendant wanted the annual would fail if he had no paper to circulate as his own. It did not concern the plaintiff why, or on what terms, he ceased to have such a need. When he, in good faith, supposed he had sold out, and the bargain only failed for want of a legal formality, a countermand on that supposition, which gave plaintiff notice to incur no expense, was sufficient to end the arrangement if one existed. Plaintiff had no concern with the technical question whether the sale was complete.

And, whether the countermand was warranted or not, it

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was at least a refusal to have the contract carried out; and, as there were no goods accepted, and none ready to furnish at the date of the countermand, it would raise questions not only as to the rule of damages, but also as to the form of declaring. The judgment should be reversed, and a new trial granted.

MORSE and LONG, JJ., concurred with CAMPBELL, J.

CHAMPLIN, J. I think the facts should have been submitted to the jury; and, if they had found that defendant executed the instrument, understanding what it was, they would have been justified in finding a complete contract binding upon both parties.

SHERWOOD, C. J., concurred with CHAMPLIN, J.

THE FIRST NATIONAL BANK OF STANTON v. JACOB G. SUMMERS.

Chattel mortgage—Failure to file or renew—Change of possession—Execution—Replevin.

1. A debtor mortgaged certain hotel furniture to secure an indorser, who assigned the mortgage to a bank as security for the payment of the notes, which mortgage was filed, but lapsed for want of renewal. The mortgagor leased the furniture, and assigned the lease to the bank, to which the rent was to be paid, and an inventory was taken and delivered to the bank, and it was agreed that the bank should take possession of the property; but none of it was moved, nor was the lessee disturbed in his possession, which he held until a judgment creditor of the owner levied on the furniture, when the bank brought replevin.

   Held, that there was no such actual and continued change of possession as would dispense with the renewal of the mortgage, or affect that of the lessee, and that the bank could not maintain replevin for the property.

2. Where articles are of that bulky nature that a symbolical delivery only can be made, and they are permitted to remain in a place

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where the possession may be equivocal, or what could not be said to be an actual possession, all doubts must be solved in favor of the purchaser or creditor, and against a mortgagee who has failed to file or renew his mortgage.[1] *Anderson v. Brenneman*, 44 Mich. 202.

3. An officer has the right to take possession of chattel-mortgaged property, and detain the same as against the mortgagee, for the time prescribed by law for bringing it to sale on his execution.[2]

Error to Montcalm. (Smith, J.) Argued April 19, 1889. Decided June 7, 1889.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

N. O. Griswold (*McGarry & Ford*, of counsel), for appellant.

George S. Steere, for defendant.

LONG, J. This is an action of replevin brought to recover possession of a quantity of furniture used in the Grand Central Hotel at Stanton.

The defendant is sheriff of Montcalm county, and had levied upon the property by virtue of an execution issued upon a judgment against one Patrick H. McGarry.

Plaintiff claimed the right to the possession of the property under a certain chattel mortgage executed by McGarry to William F. Turner for $3,500, and assigned by Turner to it, and an arrangement by which plaintiff claimed to be in possession of the property under the mortgage at the time the levy was made by defendant under the execution.

The cause was tried before the court without a jury, and the court made certain findings of facts and law, and gave judgment for defendant.

The case comes to this Court by writ of error, all the evi-

[1] See *Smith v. Greenop*, 60 Mich. 62 (head-note 4); *Buhl Iron Works v. Teuton*, 67 Mich. 623.

[2] See *Williams v. Raper*, 67 Mich. 427 (head-note 5, and note).

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dence in the case being returned in the record. It appears that Patrick H. McGarry purchased this property, sometime in March, 1886, for some $3,500, obtaining the money from the plaintiff to make the purchase, giving his notes to it for the same, indorsed by William F. Turner. In order to secure Turner upon these indorsements, he made and delivered to him, on March 11, 1886, a chattel mortgage upon the furniture for $3,500. This mortgage Turner caused to be filed on the same day in the office of the city clerk of Stanton.

October 28, 1886, Turner assigned this mortgage to the plaintiff, stating therein:

"This assignment being given to secure the payment of any and all notes given by P. H. McGarry, and indorsed by me, or any and all of the renewals of the whole or any part of such notes."

January 31, 1887, Turner filed an affidavit of renewal of this mortgage in the office of the clerk of the city of Stanton, claiming to be the owner thereof, and that his interest in the chattels remained unchanged. This is the only renewal ever made of the mortgage.

In June, 1887, McGarry leased the hotel and furniture to one Kaltenbeck by a written lease, and assigned the lease to the bank by a writing indorsed thereon. At the time this lease was made and assigned to the bank, an arrangement was made between McGarry, Kaltenbeck, and the bank that Kaltenbeck should thereafter pay all rents to the bank, and an inventory was then taken of the property covered by the mortgage, and given over to the bank; McGarry, Kaltenbeck, and Turner all agreeing that the bank should from that time have possession. Kaltenbeck thereafter kept the hotel, used the furniture, and was in actual possession at the time the defendant levied his execution thereon.

It is conceded that no valid renewal of the mortgage was ever made, but counsel for plaintiff insist that the plaintiff

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was in possession of the property at the time the levy was made, and therefore entitled to maintain this suit in replevin, though the mortgage was not renewed as provided by statute.

It is undoubtedly true that if there is an actual delivery of the property mortgaged over to the mortgagee, and an actual and continued change of possession, there is no need of filing or renewing the mortgage under the common-law rule, as actual possession is equivalent to filing and renewing under the statute.

Our statute providing for the filing and renewal of chattel mortgages was intended to do away with the necessity of delivery, and to enable the mortgagor to retain possession until default.

But is there such possession shown here?

Three witnesses testify to the arrangement. Counsel for plaintiff summarized this testimony in their brief, which is substantially, as shown by the record, as follows:

William F. Turner says:

"The property in question—the hotel furniture—was leased with the hotel to Kaltenbeck. After that there was an arrangement made with the bank. An invoice was taken of the property, and turned over to the bank, and the bank was to take charge of the property, and collect all the rents paid under the lease. The talk and arrangement was that the bank was to have possession of the property. An arrangement was made that the bank should take possession of the furniture. He turned it right over to the bank. He turned it over to collect the rent as payment, and to secure them,—the bank."

Norman L. Shepard, vice-president of the bank, testified:

"The hotel furniture was turned over to the bank to look after, collect the rent, and handle it. This arrangement was in force till suit was brought. He said: 'I want you to take this property, take care of it, look after this matter, collect rents, etc.'"

A. D. F. Gardner, cashier of the bank, says:

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"He wished to turn the possession over to the bank. The matter was talked over thoroughly, and the understanding was that the possession and control of the furniture should be given to the bank."

This is substantially all the testimony given on the question of possession by plaintiff.

It appears, however, that before this arrangement was made McGarry had leased all the property to Kaltenbeck by a written lease, and Kaltenbeck was in possession thereunder, using the furniture in connection with the hotel, and continued to do so up to the time the levy was made. None of the property was moved, and no arrangement appears to have been made then to disturb Kaltenbeck in his possession. All the plaintiff received was an assignment of the lease, with authority to collect rents from Kaltenbeck thereunder, plaintiff simply stepping into the shoes of McGarry, so far as the rights under the lease were concerned.

It took no conveyance of the title from McGarry, and the actual possession and control remained in Kaltenbeck. The plaintiff then stood in position of assignee of the lessor of the property, with authority to collect rent, and also as assignee of the mortgagee, at the time of the levy, the mortgage under which it claimed not having been renewed, as provided by the statute.

We do not think there was any evidence showing such actual and continued change of possession of the property mortgaged as to do away with the requirements of the statute for the filing and renewal of the mortgage.

The plaintiff could have protected its rights by renewing its mortgage, as provided by statute. This it failed to do. As was said by this Court in *Anderson v. Brenneman*, 44 Mich. 202 (6 N. W. Rep. 222):

"Under such circumstances, where doubts exist, they must be solved in favor of the purchaser or creditor, and against the mortgagee, because he, having power to protect himself

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fully, and prevent others from being deceived, has not done so."

The possession being in Mr. Kaltenbeck at the time of the levy, and he being entitled to possession under his lease at that time, the plaintiff could not maintain the action of replevin. Even if this were not so, and the mortgage was a valid one, yet it is shown by the record that the title was in McGarry, the judgment debtor, and the plaintiff standing only in the position of a mortgagee to the property.

The officer had the right to take possession under his execution, and detain the goods as against the mortgagee, for the time prescribed by law for bringing them to sale on the execution.

We think the court below was not in error in finding a judgment in favor of the defendant.

The judgment must be affirmed, with costs.

The other Justices concurred.

THE PEOPLE v. WILLIAM A. HARRINGTON.

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Criminal law—Assault with intent to do great bodily harm less than murder—Holding for trial—Assault and battery—Sentence—Limit of imprisonment.

1. A justice is justified in holding a respondent for trial for an assault with intent to do great bodily harm less than murder, where there was testimony of a very serious bodily harm actually inflicted, and of express malice of an aggravated kind.
2. On a conviction at the circuit of a crime triable by a justice, no greater punishment can be inflicted than could be imposed by the justice.
3. The limit of imprisonment by a justice is three months, and the imposition of a fine will not permit a longer sentence, which, if imposed, is void for the *excess*.

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Error to Cass. (O'Hara, J.) Argued April 23, 1889. Decided June 7, 1889.

Respondent was convicted of assault and battery, and sentenced to 40 days' imprisonment, and to pay a fine of $75 within said period, or be imprisoned until such fine was paid, not exceeding four months. Judgment reversed as to excess of imprisonment beyond three months, and, as that time had expired, prisoner was discharged. The facts are stated in the opinion.

Howell & Carr, for respondent.

F. J. Atwell, prosecuting attorney, for the People.

CAMPBELL, J. Respondent was charged before a justice of the peace in Cass county with an assault on Edward P. Boyd, with intent to do great bodily harm less than murder. The justice examined him, and upon the testimony held him over on that charge for trial at the circuit. On his trial he was convicted of assault and battery only. He was sentenced to be imprisoned 40 days, and to pay a fine of $75 within said 40 days, or in default to be imprisoned till paid, but the whole imprisonment not to exceed 4 months.

A motion was made to quash the information for the alleged reason that there was no testimony before the justice tending to show the serious offense charged, and that he should have tried the case himself. We do not think so. There was testimony of a very serious bodily harm actually inflicted, and of express malice of an aggravated kind. We do not know what was proved at the circuit, but we have no doubt the justice had grounds for taking the course he did.

The only question which we need consider relates to the sentence. It is the settled law of this State that, for a conviction at the circuit of a crime within the jurisdiction of a justice, no greater punishment can be given than could be

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imposed by a justice. Three months' imprisonment is all that can be awarded by a justice, and, although the statutes are a little blind, the construction has always been acted on that the imposition of a fine will not permit the imprisonment to be lengthened beyond three months in all. If imprisonment is awarded for three months, a fine would have to be collected in some other way.

The question, then, is whether the sentence of imprisonment separately for 40 days and a fine, which is to be followed by imprisonment till paid, but not beyond four months from sentence, is void entirely, or void only as far as excessive. We do not think the sentence is wholly void. The court could have imprisoned absolutely for three months. It could have imprisoned for three months in default of payment of the fine. The intention is evident that in case of such default the defendant should remain in prison four months. Of this four months only one month was excessive.

The judgment should be reversed as to the term of imprisonment beyond three months from February 25; and, as that time has now expired, the prisoner is entitled to be discharged from custody.

Judgment will be rendered accordingly.

CHAMPLIN, MORSE, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

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THE PEOPLE v. JOSEPH G. McCAFFREY.

Perjury—Bill for divorce—Jurisdiction.

1. Perjury is assignable upon an oath taken to a bill for divorce.
2. The residence of one of the parties to a bill for divorce in the county where the suit is brought is essential to granting the relief sought, but the omission of such averment from the bill may be cured by amendment.
3. Where a bill for divorce contained sufficient allegations to give the court jurisdiction and to warrant the relief sought, if true, the fact that, upon trial of the complainant for perjury in swearing to said bill, it appeared that neither party had resided in this State for the *statutory year*, will not bar a conviction.

Error to Macomb. (Canfield, J.) Argued April 24, 1889. Decided June 7, 1889.

Respondent was convicted of perjury. Conviction affirmed. The facts are stated in the opinion.

Edward McNamara (*Charles Flowers*, of counsel), for respondent.

J. G. Tucker, prosecuting attorney, for the People.

LONG, J. On June 12, 1883, the defendant filed a bill for divorce against his wife, Gertrude McCaffrey, in the circuit court for Macomb county, in chancery.

The bill alleged their marriage as having taken place at Ogdensburg, St. Lawrence county, New York, on May 10, 1874, and that they had lived and cohabited together as husband and wife up to December 1, 1885; that he has resided in this State since said marriage continually for a period of two years and upwards, immediately preceding the time of exhibiting his bill; that there are no children as the issue of the marriage; that the defendant, disregarding her marriage

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vow, deserted him in the month of February, 1886; and that previous to her desertion she constantly was in the habit of practicing upon him extreme cruelty.

The bill then sets out with much particularity the various acts of extreme cruelty claimed to have been practiced upon him by the defendant, and alleges that the acts done, and cause of divorce charged in the bill for which divorce is sought, were committed without the consent, connivance, privity, or procurement of the complainant, and that the bil is not founded on, or exhibited in consequence of, any collusion, agreement, etc.

The bill contains the usual prayer for answer, relief, and process.

The bill was signed by the defendant, Joseph G. McCaffrey, and indorsed by Francis B. Owen, his solicitor.

This bill was sworn to by the defendant in this case, the notary public making and annexing to the bill the following jurat:

"STATE OF MICHIGAN, } ss.
County of Macomb, }

"On this twelfth day of June, A. D. 1888, before me personally came the above named Joseph G. McCaffrey, and made oath that he has heard read the foregoing bill of complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true.

"And he does swear that there is no collusion, understanding, or agreement whatever between himself and the said defendant herein in relation to this application for divorce.

"CHARLES A. FITCH,
"Notary Public, Macomb Co., Mich."

This bill so verified was filed in the office of the register of said court on the twelfth day of June, 1888.

The defendant was informed against in the circuit court for Macomb county for perjury in falsely swearing to this bill of complaint.

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The allegations in the information are, after setting out the bill of complaint and its verification, that the defendant was not intermarried with Gertrude Carper, as alleged in the bill, at Ogdensburg, St. Lawrence county, New York, on or about May 10, 1874, but, on the contrary, was married to her on July 30, 1887, at Chicago, in the state of Illinois, and that they did not live and cohabit together as husband and wife from the tenth day of May, 1874, until December 1, 1885, and that they neither lived nor cohabited together as husband and wife at any time or place prior to July 30, 1887; and that at time he took his corporal oath on June 12, 1888, he had not resided in this State, since said marriage with the defendant named in said bill, continually for a period of two years and upwards immediately preceding the time of exhibiting said bill, and neither had he resided in this State one year immediately preceding the time of exhibiting said bill of complaint; that the said Gertrude McCaffrey did not, disregarding the solemnity of her marriage vow, desert her husband in the month of February, 1886, neither had she any husband at that time; and that Gertrude McCaffrey was not in the habit of practicing extreme cruelty upon complainant mentioned in the bill.

The information then negatives each and every act of extreme cruelty charged in the bill, and concludes as follows:

"And whereas, in truth and in fact, the said bill of complaint that the said Joseph G. McCaffrey had heard read, and by him subscribed, and knew the contents thereof, was not then and there 'true of his own knowledge,' except as to the matters which were then and there stated to be on his information or belief, and as to those matters stated to be on his information or belief, he did not then and there believe it to be true.

"And so the prosecuting attorney aforesaid says and gives the said court to understand and be informed that the said Joseph G. McCaffrey, on the twelfth day of June, A. D. 1888, at the city of Mt. Clemens aforesaid, in the county of Macomb

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aforesaid, before the said Charles A. Fitch, a notary public as aforesaid (he, the said Charles A. Fitch, notary public aforesaid then and there having such power and authority as aforesaid), by his own most wicked and corrupt mind, in manner and form aforesaid, willfully and corruptly did commit willful and corrupt perjury, contrary to the form of the statute," etc.

The defendant was convicted in said circuit court before a jury under this information, and sentenced to imprisonment for the term of five years in the State prison at Jackson, and brings the case into this Court by writ of error.

It appears that after the bill was filed the defendant went before a circuit court commissioner of Macomb county, and made an affidavit of non-residence, in which he made oath that his wife was a resident of Springfield, in the state of Ohio, and not of Michigan, and upon this affidavit procured an order for her appearance from the commissioner, which defendant caused to be published in the Mt. Clemens Monitor, a newspaper printed and published in said county.

After the arrangement had been made to have this order published, the defendant and his solicitor in the divorce case went to Detroit, and on July 19, 1888, both returned to Mt. Clemens, accompanied by one Jennie L. Judson, whom McCaffrey had procured to act as a witness in his divorce proceedings.

The parties went before a justice of the peace at Mt. Clemens, where two affidavits were prepared, one sworn to by McCaffrey, and the other by Jennie L. Judson.

In this affidavit Jennie L. Judson testified that she had known the complainant since the year 1874, and was acquainted with Gertrude McCaffrey, his wife, up to the time of her desertion from Joseph G. McCaffrey, which occurred in February, 1886.

McCaffrey testified in his affidavit that he married Gertrude Carper in the year 1874, and lived with her until February, 1886, from which time said Gertrude deserted from

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his bed and board; that he had been a resident of Michigan for five years; and that he seeks a divorce from said Gertrude according to the prayer of his bill filed in the office of the county clerk of Macomb county, notice of said cause having been published in the Mt. Clemens Monitor the legal length of time, etc.

These affidavits were made and sworn to before the justice, Mr. Salisbury, on July 19, 1888, and were called by the parties the "proofs in the case," the justice appearing for the defendant.

Mr. Salisbury then wanted something to show that he had authority to appear for the defendant in the divorce case. McCaffrey thereupon, after returning to Detroit, took to Mrs. Judson a draft of a letter to Salisbury, prepared by himself, which purported to give Salisbury authority to act for the defendant, and which he requested Mrs. Judson to copy, so that it might appear in a lady's handwriting. This Mrs. Judson refused to do, but a letter was produced to Salisbury purporting to come from Mrs. McCaffrey in all respects like the one shown to Mrs. Judson by McCaffrey.

These affidavits were all filed in the cause with the register of the court, and Owen, acting as solicitor for the complainant, also filed an affidavit of regularity in the cause.

On the second day of August following the complaint was made against the defendant for perjury.

At the close of the testimony the court charged the jury substantially that perjury was not charged upon these papers, filed outside the bill, and he could not be found guilty of perjury even if these papers were false and untrue; that they were only introduced and received in evidence as a part of the history of the transaction; that perjury is not assigned upon the whole bill, but is assigned upon the following averments:

1. That the defendant and Anna Gertrude Carper were

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married at Ogdensburg, St. Lawrence county, New York, on or about May 10, 1874.

2. That they, after being so married, lived and cohabited together as husband and wife from on or about May 10, 1874, until on or about December 1, 1885.

3. That the parties resided in this State after marriage for a period of two years and upwards, immediately preceding the time of exhibiting the bill of complaint.

4. That the defendant, disregarding the solemnity of her marriage vow, in the month of February, 1886, deserted her husband.

The court took from the consideration of the jury all questions relative to the alleged acts of cruel treatment stated in the bill, but charged that the statements in the bill as to the marriage, the time of the marriage, the residence of the parties, their cohabitation, and the desertion were all material allegations in the bill, and, if he swore falsely as to those allegations, he would be guilty of perjury.

The court then further charged the jury as follows:

"It is averred in the information that the oath was administered to the defendant by Mr. Fitch on June 12, and that he wrote or signed this certificate of that verification attached to the bill. Now, it is necessary that you should be satisfied beyond a reasonable doubt that that oath was so administered in the form in which it is alleged in the information, and which I have substantially repeated to you.

"It is claimed on the part of the prosecution, and they have adduced evidence to show, that it was so administered to him.

"It is claimed on the part of the defendant that it was not; that the words 'and you do swear that there is no collusion, understanding, or agreement whatever between yourself and the defendant herein, in relation to this, your application for divorce,' were not included in the oath that was administered to him.

"Now, if that is true, you should find the defendant not guilty. * * * It is a question for you to determine, from the evidence in the case, whether the oath was administered as claimed by the prosecution,—the whole oath,—or whether it was not, as claimed by the defendant. * * *

"It is claimed on the part of the defendant that he did not know the contents of this bill. * * * If the

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statements I have referred to you for your consideration were in fact in the bill of complaint, and sworn to by the defendant, and such statements, or any of them, were false in fact, yet if the defendant did not in fact know they were contained in the bill, but honestly supposed the bill contained only true statements, or such as he honestly believed to be true, and was deceived as to the real statements contained in the bill, and swore to it under the advice of his counsel, and did not knowingly and intentionally swear to statements he knew to be false, he should be acquitted."

This charge is certainly as fair to the defendant as he was entitled to under the circumstances, unless the points made in the brief of his counsel can be sustained as a matter of law, and which we shall discuss further on.

There does not appear to be much contradiction in the record upon the questions of the untruthfulness of the statements in the bill. In fact, it is practically conceded that the defendant, on July 30, 1887, was married to Anna Gertrude Carper at the city of Chicago, Illinois, by one William S. Post, a minister of the gospel. Shortly after their marriage, in August, 1887, defendant and his wife went to live at Windsor, Ontario, where they resided until sometime in February, 1888, when they removed to Detroit, Michigan.

About April 25, 1888, Mrs. McCaffrey left Detroit to go to Ohio to visit her sister, intending to return on July 4, 1888, to her husband. McCaffrey was in constant correspondence with her during her stay there, writing her in the months of May, June, and up to July 17, 1888.

On June 12, 1888, not two months after Mrs. McCaffrey had gone on her visit, this bill was filed, charging the marriage to have taken place on May 10, 1874, at Ogdensburg, St. Lawrence county, New York, and the desertion as commencing December 1, 1885, some 19 months before the marriage actually took place.

The contention of defendant's counsel, however, is—

1. That the bill for divorce filed by defendant in the circuit court for Macomb county, in chancery, was filed in a

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court which had no jurisdiction of the cause, as shown by the bill itself and the evidence in the case, and that, although the defendant may have sworn falsely to the bill, he is not guilty of perjury.

2. That perjury cannot be predicated upon the oath to a bill for divorce.

3. That the evidence is uncontradicted that the clause as to collusion was added to the jurat after the oath was administered.

4. That the evidence is uncontradicted that the bill was not read over to defendant, or read to him before he signed it.

We shall discuss these questions in their inverse order. While no direct testimony was given showing that the bill was read over to the defendant before signing, yet the circumstances surrounding the case, the letter written by defendant for Mrs. Judson to sign, which was to be forwarded to Salisbury, and his conversation with Mrs. Judson as detailed by her, show very conclusively that the defendant knew what the bill contained, and that the time of the marriage was purposely stated in the bill at a time anterior to the time when the marriage actually took place, to the knowledge of defendant.

One cannot read the testimony contained in this record without coming to the conclusion that the defendant was attempting, with the aid of his solicitor, to perpetrate a fraud upon the court, and a grievous wrong upon his wife, and obtain a divorce, intending to marry again within a short time. We think there was evidence to satisfy any fair-minded man that he knew fully the contents of the bill, and that he willfully and deliberately swore to it as true. We think, also, that there was some evidence to go to the jury upon the question whether the clause as to collusion was added to the jurat before the defendant was sworn to it.

Mr. James G. Tucker testifies that the defendant, with his solicitor, came to him with the bill, and he accompanied them to Mr. Fitch, the notary, who swore the defend-

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ant to the bill, and to the usual oath was added the additional words that there was no collusion, etc.

Mr. Fitch testified that he read the oath over, and administered it, and his recollection was that these words were added, and he read the whole of it over to the defendant in administering the oath to him.

There is no force in the proposition of counsel that perjury cannot be predicated upon the oath to a bill for divorce.

Section 6623, How. Stat., provides:

"The Supreme Court shall have power, from time to time, by general rules of the Court, to establish, alter, modify, or amend the practice of the circuit courts in chancery, in the cases not provided for by statute," etc.

In pursuance of this provision of the statute, chancery rule No. 95 was adopted by this Court to govern the practice of such courts. This rule provides:

"All bills for the purpose of obtaining divorce, whether the husband or wife is complainant, shall be duly verified by oath in the usual manner of verifying bills where, by the course and practice of the court, an oath is required," etc.

In 1887 the Legislature of the State recognizing the force of the above rule, by Act No. 137, § 10, provided:

"No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, and the oath or affirmation administered to the complainant in swearing to such petition or bill shall, in addition to all other legal requirements, recite the following: 'And you do solemnly swear (or affirm) that there is no collusion, understanding, or agreement whatever between yourself and the defendant herein in relation to your application for divorce;'"—

Thus giving the rule above stated the force of statute law. The statutes of this State (How. Stat. § 9236) further provide:

"If any person authorized by any statute of this State to take an oath, or if any person of whom an oath shall be required by law, shall willfully swear falsely in regard to any matter or thing respecting which such oath is authorized or

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required, such person shall be deemed guilty of perjury," etc.

The present case is distinguishable from *People v. Gaige*, 26 Mich. 30. In that case the bill was not required to be verified by oath under any statute of this State, and it was held that perjury could not be predicated upon an oath thereto, such oath being extrajudicial.

In *Beecher v. Anderson*, 45 Mich. 543 (8 N. W. Rep. 539), it was said by this Court that where a bill in equity, not seeking discovery, is filed against a corporation, the general manager, if not himself made a defendant, need not swear to the answer, and if he does so, in a case where his oath could not affect the issue or strengthen the answer, his oath, if false, will not sustain a complaint for perjury.

In the present case, however, the complainant is compelled by express provision of the statute to verify his bill by oath. It was so verified, and perjury may be assigned upon the false allegations in the bill which are material. While it is true the bill is not used as evidence on the hearing of the matters therein stated, yet, under the provisions of the statute above cited, perjury may be predicated upon such an oath so taken.

The only remaining contention is that the circuit court of Macomb county, in chancery, had no jurisdiction, inasmuch as the bill itself did not recite the fact that either the plaintiff or defendant resided in that county, and that the proofs in the present case show conclusively that neither of them resided there at the time the bill was filed.

The bill was drafted upon an ordinary printed blank form, but the residence of the complainant as to the county was not filled in.

The Constitution and statutes of this State have in express terms conferred an equity jurisdiction upon the several circuit courts, co-extensive with that possessed by the English courts of chancery, with certain exceptions.

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The Constitution, Art. 6, establishes a Supreme Court, with appellate jurisdiction, and circuit courts, which have original jurisdiction in all matters, civil and criminal, not exempted in this Constitution, and not prohibited by law.

Section 1, chap. 247, How. Stat., provides:

"That the several circuit courts of this State shall be courts of chancery within and for their respective counties," etc.

Section 21 of the same chapter provides that—

"The powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges in chancery in England, with the exceptions, additions, and limitations created and imposed by the Constitution and laws of this State."

These provisions were also found in the Revised Statutes of 1846, c. 90, which established the former court of chancery. Section 21 was also found in the Revised Statutes of 1838, and applied to the then existing separate courts of chancery.

It is claimed, however, by counsel for defendant, that section 6228, How. Stat., limits the jurisdiction of the court of chancery in divorce cases to the county where the parties or one of them reside. This section provides:

"A divorce from the bonds of matrimony may be decreed by the circuit court of the county where the parties or one of them reside, or by the court of chancery, on the application by petition or bill of the aggrieved party," etc.

By this limitation it is claimed the circuit court, in chancery, of Macomb county, had no jurisdiction over the person of the complainant in that case, although the bill was regularly filed in that court. The complainant, in filing his bill had, however, submitted himself to that jurisdiction. That court is one of general jurisdiction. Its process is co-extensive with the boundaries of the State, and the failure to allege his res-

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idence within that particular county was not a jurisdictional defect.

The statute does not make this a necessary allegation in the bill, but such fact and the omission to allege it may be cured by amendment, though this fact must be made to appear in the proofs in order to give relief.

The record shows a residence within the State a sufficient length of time, before exhibiting the bill, to give the court jurisdiction, and, if a defect at all, it could be cured by amendment. The bill contained sufficient allegations, which, if true, made a proper case for relief in that court.

The fact that upon the trial of the present case it was made to appear that neither party had resided within the State the length of time required by the statute to give the court jurisdiction of the cause could not affect the question involved here.

Perjury is assigned upon the allegations contained in the bill then filed on June 12, 1888, and the case is brought clearly within the provisions of section 9236, How. Stat., above cited.

We find no error in the refusal of the court to instruct the jury upon this part of the case as requested by defendant's counsel. It is very clear that the defendant willfully, corruptly, and deliberately had inserted into his bill certain matters which he knew to be false. These matters were material, and were placed in the bill for the purpose of bringing the case within the statutes of this State giving the court power to grant the divorce on the ground of desertion.

We have no doubt that these matters were alleged in the bill with the full knowledge of the defendant as well as his solicitor, and that the defendant took the oath as stated in and attached to the bill; and if this solicitor entered into this scheme—which seems apparent from the record—to perpetrate this fraud upon the court, and to commit so great a

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wrong upon the wife of respondent, drafted the bill, and inserted therein these false statements and dates, and knowingly procured and advised the respondent, acting as his solicitor, to swear to the same, it would seem to be the duty of the officers of that county to investigate the matter, and see if he has made himself amendable to the criminal law.

We find no error in the record, and the conviction must be affirmed.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. SHERWOOD, C. J., did not sit.

THE PEOPLE v. HELEN GASTRO.

Criminal law—Statements of respondent—Charge to jury—Keeping house of ill fame—Evidence—Construction of words.

1. A statement made by a prisoner to a sheriff without question or suggestion on his part, and entirely of the prisoner's own offer, if material, is admissible as evidence on the trial.
2. Where, on the trial of a respondent for keeping a house of ill fame, a witness testifies to her calling a certain inmate "a pimp" or "her pimp," it is error for the court to determine which language was used, that being a question for the jury.
3. Words sometimes acquire a peculiar significance in a particular locality, but the court cannot take judicial notice of such fact.
4. Courts will take judicial notice of the ordinary meaning of English words, but not of uncommon or extraordinary meanings applied in isolated cases or in particular localities.
5. The word "pimp" is not a technical one, nor has it acquired any peculiar or appropriate meaning in the law, and is therefore to be construed and understood according to the common and approved usage of the language. How. Stat. § 2.
6. It is error for the court to point out particular testimony, and instruct the jury that, if they believe it, it is "pretty strong evidence" in favor of the guilt of the accused, without cautioning them not to be influenced by such opinion, and instructing them that they are the exclusive judges of the weight of the testimony, and of what facts it tends to establish.

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7. The weight to be given to testimony, and all inferences to be drawn therefrom, is exclusively for the jury; and it is error for the court to weigh the testimony for them, or draw inferences from it.
8. The statute punishing the keeper of a house of ill fame is designed to prohibit the keeping and maintaining of houses which persons are permitted to frequent for the purpose of unlawful sexual intercourse.
9. A single act of lewdness or prostitution will not constitute the offense of "keeping a house of ill fame;" but, if the place where such act occurs is shown to be such a house, resorted to for such purpose, proof of such single act is sufficient upon this branch of the case.

Error to Gogebic. (Williams, J.) Argued April 24, 1889. Decided June 7, 1889.

Respondent was convicted of keeping a house of ill fame. Reversed and new trial granted. The facts are stated in the opinion.

Kutts & Wilson (*Birney Hoyt*, of counsel), for respondent.

S. V. R. Trowbridge, Attorney General, and *Charles M. Howell*, prosecuting attorney, for the People.

CHAMPLIN, J. The respondent was charged with unlawfully keeping and maintaining a house of ill fame, resorted to for the purpose of prostitution and lewdness, contrary to the statute, at the village of Bessemer, Gogebic county. She was convicted, and sentenced to be imprisoned in the Detroit house of correction for 18 months at hard labor.

The prosecution called witnesses, and was permitted, against the objections of the attorneys for respondent, to prove the character of the house occupied by her, from what they had heard, for a long space of time. The respondent's attorneys insisted that the proofs should be confined to the day named in the information, but—

"The court ruled the testimony must show the offense

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charged was committed on the day laid; but, as bearing upon that question, evidence was admissible, and would be received, as to the time within one week of that alleged."

There was no error in permitting the testimony as to the ill fame of the house to extend back one week or even longer if the respondent was the keeper of the house during that time. The court rightly held that the proof must show that the offense was committed on the day alleged in the information, the elements of the offense being—

1. That it was a house of ill fame.
2. That the respondent kept it.
3. That it was resorted to for the purpose of prostitution and lewdness.

The testimony to establish the fact that the house was resorted to for the purpose of prostitution and lewdness consisted of that given by David F. Foley, George Hogle, and Floyd C. McIntyre, who each testified to the bad reputation of the house, and that they went to her house together in the night-time a few days before her arrest, and found respondent there, and a man by the name of Martin; that they were not in bed; that Martin made his home at said respondent's house; that they also found one other woman at respondent's house, who was in bed with a man whom they had known for some length of time as a single man, although they would not swear that he had not married the woman before such night, but they did not think he had done so; that the woman and man got up, and she used some indecent language.

Hogle testified that respondent called said Martin "a pimp," or "her pimp," and also called him and others "pimps."

The witness Foley was sheriff, and testified to certain admissions made by the respondent after the arrest, and while she was imprisoned in jail. These were objected to as not having been made voluntarily. In reply to a question from the

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court, the witness stated that such statement was made without question or suggestion, and was entirely of her own offer. He thereupon testified that respondent stated to him that she kept a whore-house.

The bill of exceptions contains the statement that—

"The above were all the witnesses sworn on the trial of the cause, and the foregoing is the substance of all the evidence on the part of the prosecution."

There was no error in admitting the testimony of the sheriff as to respondent's admissions.

The circuit judge in charging the jury said:

"We have some testimony with reference to the language which was used in the house, as to what the characters of the inmates were,—whether they were prostitutes or not. We have the testimony of one witness who says that this respondent made the remark that this man, whatever his name is, was 'her pimp.' We all know what that is when we are outdoors, and we should know what it means when we are here, just as well as when we are outdoors. We know, as a matter of fact, that it is a man who has intercourse with a loose woman, and usually she is taking care of him,—supporting him. When she says such a man is 'her pimp,' that is what she means. Well, there is a case of unwarranted sexual intercourse if you believe that to be true.

"Now, under the testimony we have the girl there; and there is testimony of one or more witnesses tending to show that the respondent, on a certain occasion just after this woman was caught in bed with a man not her husband, made the remark to her that she was a whore. There is some evidence of that kind. Now, language of that kind, made use of by the respondent herself to this woman, would be pretty strong evidence against her that that other woman was a whore, and that she had such a kind of a house there. It is her own statement as to what the character of the woman was; and being her own house, if she had that kind of a woman around there habitually, and they frequented it (they certainly, according to the evidence, frequented it at one time), you have a right to consider that as pretty strong evidence as bearing upon the character of the people who come to that house.

"There is evidence by Mr. Foley, by which he swears that

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she said she kept a whore-house. Now it is for you to say whether she told him that or not. If you believe that she did tell Mr. Foley that she kept a whore-house, that is very strong evidence in favor of the guilt of this woman. People do not usually admit themselves guilty of crime when they are not guilty. It is more usual to deny it, and they most always do deny it. If a man, charged with crime, admits that he is guilty of it, it is pretty conclusive evidence, and evidence sufficient for you to act upon in finding him guilty. It is evidence, at least, that I should not fail to act upon if I was on the jury."

The court committed several errors in giving the above instructions. The testimony of Hogle was that the respondent called the man Martin "a pimp," or "her pimp," and also called Hogle and others "pimps." The court was not warranted in determining the language used by her, and applying it to Martin as "her pimp." It was for the jury to say whether she called Martin "a pimp," or called him "her pimp."

The circuit judge assumed that she called him "her pimp," and then proceeded to define the word "pimp," which definition differs essentially from the common acceptance of the term as defined by lexicographers. Worcester defines it as—

"One who provides gratifications for the lust of others; a procurer; a panderer."

Webster's definition is the same. The circuit judge says a pimp—

"Is a man who has intercourse with a loose woman, and usually she is taking care of him,—supporting him."

Words sometimes acquire a peculiar signification, in a particular locality, different from their ordinary meaning, but, when such is the case, it is a fact requiring proof, and not a fact which the court can take judicial notice of; the rule being that courts will take judicial notice of the ordinary meaning of English words, but not of uncommon or extra-

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ordinary meanings applied in isolated cases or in particular localities. The word "pimp" is not, so far as we are informed, a technical word, nor has it acquired any peculiar or appropriate meaning in the law. It is therefore to be construed and understood according to the common and approved usage of the language. How. Stat. § 2.

The court, after affixing a definition, proceeded to draw an inference from the testimony, both as to what the respondent meant and as to the fact established by it, namely, that it was a case of unwarranted sexual intercourse. In this he usurped the province of the jury.

The circuit judge also erred in pointing out particular testimony, and instructing the jury, if they believed it, that it was "pretty strong evidence," and "very strong evidence," in favor of the guilt of the accused; and, with reference to some of the evidence, that—

"It is evidence, at least, that I should not fail to act upon if I was on the jury."

Nowhere in his charge does he caution the jury not to be influenced by his individual expression of opinion, or tell them that they are the exclusive judges of the weight of the testimony, and of what facts it tends to establish. We cannot say that they were not influenced by his opinions upon the weight of the evidence, or that they distinguished between the judge's instructions as to the law, which they were in duty bound to follow, and his opinion upon the weight and tendency of the evidence, which they were to determine.

It has been repeatedly held by this Court that the weight to be given to the testimony, and all inferences to be drawn therefrom, is exclusively for the jury, and that it is error for the court to weigh the testimony for them, or draw inferences from it. While we have held that a circuit judge may express his opinion upon the weight to be given to certain testimony, where he at the same time fully instructs the jury that they are the exclusive judges of the weight of the tes-

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timony and of the credibility of the witnesses, yet the tenor of our decisions is to the effect that it is not a practice that should be generally indulged in; and many cases have been reversed upon this ground. *Perrott v. Shearer*, 17 Mich. 48; *Knowles v. People*, 15 Id. 408, 412; *Welch v. Ware*, 32 Id. 77; *Blackwood v. Brown*, Id. 104; *Richards v. Fuller*, 38 Id. 653, 657; *Hall v. People*, 39 Id. 717; *Beurmann v. Van Buren*, 44 Id. 496 (7 N. W. Rep. 67); *People v. Lyons*, 49 Id. 78, 82 (13 N. W. Rep. 365).

The counsel for defendant requested the court to charge the jury that "a single act of illicit intercourse is not sufficient to convict." In *O'Brien v. People*, 28 Mich. 213, it was held that the language of this statute refers to persons of bad character, and the word "resorted" implies that the house was visited frequently by that class of persons; and hence it is argued that, as the testimony in this case shows only a single instance of a person being found in the house, in the absence of testimony that men were seen resorting there, the offense was not made out. It has been held that a single act of prostitution, or habitual acts by one person, do not constitute the house bawdy. *Com. v. Lambert*, 12 Allen, 177; *State v. Evans*, 5 Ired. 603; *State v. Garing*, 75 Me. 591.

In *Com. v. Lambert* the court said that the permission, by the keeper of a house, of a single act of illicit intercourse within it does not of itself constitute the offense described in the statute.

"To hold that it did, would be to leave wholly out of view the meaning of the phrase 'resorted to,' as used in those sections of the statute."

The statute is designed to prohibit the keeping and maintaining of a house which persons are permitted to frequent for the purpose of unlawful sexual intercourse, and to prevent the existence of such places of resort. A single act of lewdness or prostitution would not constitute the offense

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which the statute prohibits and punishes; but, if the house is shown to be a house of ill fame, and it is also shown that persons resort there for the purpose of prostitution or lewdness, proof of a single act of prostitution would be sufficient upon this branch of the case.

I do not decide that it is necessary to show an actual illicit intercourse. If it be shown that the inmates are prostitutes, or the house is the resort of prostitutes, and males are seen frequenting the house at night, evidence of these and kindred facts might be sufficient to satisfy a jury that the house was resorted to for the purpose of prostitution. Under the testimony appearing in this case the request should have been given.

The judgment must be reversed, and a new trial is granted.

MORSE, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

HOWARD B. LATOURETTE v. MORTIMER D. GARDNER AND SARAH A. GARDNER.

Foreclosure of mortgage—Discharge—Forgery.

In this case, on a review of the testimony, the agreement produced by the defendants, purporting to be signed by the mortgagee, and which is claimed to discharge the mortgage sought to be foreclosed, is found to be genuine, and the decree below dismissing complainant's bill and decreeing affirmative relief to defendants is affirmed. No questions of law are involved.

Appeal from Livingston. (Newton, J.) Argued April 24, 1889. Decided June 7, 1889.

Bill to foreclose a mortgage. Decree dismissing bill, and directing complainant to discharge the mortgage, affirmed. The facts are stated in the opinion.

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Luke S. Montague (*J. L. Topping*, of counsel), for complainant.

Rollin H. Person, D. Shields, and *C. Tinker*, for defendants.

LONG, J. The bill was filed in this cause on the twenty-second day of November, 1886, for the purpose of foreclosing a mortgage held by complainant as assignee of the personal representative of Timothy A. Wightman, deceased, late of Herkimer county, New York, who died on July 28, 1882, leaving a last will and testament, which was duly admitted to probate in the surrogate court for Herkimer county, and afterwards ancillary administration committed to Cyrus D. Wightman, by the probate court of Livingston county, this State.

The mortgage is upon 80 acres of land in the township of Tyrone, Livingston county, which is owned by Mortimer D. Gardner. A part of the original mortgaged premises was released on October 21, 1875.

The mortgage bears date April 5, 1871, and was given to secure the payment of the sum of $2,464 in five years after date, with interest, payable annually, at 10 per cent.

The interest had been kept up to October 21, 1881, but no part of the principal paid. The interest for the years 1882 and 1883 was paid together in the month of December, 1883, to Mrs. Katherine Wightman, the widow of deceased, and the annual interest was paid each year until October 21, 1886, but no part of the principal ever paid.

Complainant asks for the amount of principal, and interest thereon from October 21, 1886, aggregating on April 21, 1889, $2,925 22.

The defendants make no claim of the payment of any part of the principal in money, but produce a paper, claimed by them to have been made by Timothy A. Wightman in his

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life-time, bearing date October 21, 1881, and reading as follows:

"To whom this may come.

"I hereby agree that the mortgage I hold against M. D. Gardner and on said Gardner's farm in Tyrone, Livingston county, Michigan, is to run the coming five years; then to be discharged from record in full, providing the interest is paid annually at seven per cent. per annum on all sums unpaid on the above mortgage.

"*Tyrone, October 21, 1881.* T. A. WIGHTMAN."

The complainant insists that this paper was never executed by T. A. Wightman; that it was forged by the defendant Mortimer D. Gardner, or by his procurement.

It is admitted that if this paper is genuine the complainant has no standing in court, as the interest was paid by defendant annually on the mortgage for the five years following that date.

On the hearing in the court below the learned circuit judge dismissed complainant's bill, with costs.

It appears that Timothy A. Wightman was the half-brother of Amilo Gardner, the father of defendant Mortimer D. Gardner. Timothy A. Wightman's first wife was an aunt of the mother of defendant Mortimer D. Gardner. T. A. Wightman's first wife died several years ago, and in 1870 he married Mrs. Katherine Wightman, with whom he was living at the time of the execution of the paper to Mortimer D. Gardiner. Mrs. Katherine Wightman is still living. Next to his own children, Amilo Gardner and his children were the nearest blood relations of Mr. Wightman.

Mr. Amilo Gardner moved into Livingston county in 1851 or 1852, and has, with his family, ever since resided there. His family consisted of his wife and several children; Mortimer D. Gardner being one of the sons. The wife of Amilo Gardner died sometime in the summer of 1881.

Soon after the removal of Amilo Gardner to Livingston county, Mr. Wightman began to visit Livingston county from

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his home in Herkimer county, New York, for the purpose of loaning money upon mortgages on farms in Livingston county and other surrounding counties. He made his home with Amilo Gardner during his visits to Michigan, sometimes staying three or four weeks, and at times three months. As he began to loan more money, his visits were made twice a year,—in the spring and fall,—always staying with Amilo Gardner. During these visits Mortimer D. Gardner took him from place to place to make loans, to the register's office to examine titles, and to other places, as Wightman wished and directed. During his absence from the State Mortimer D. Gradner looked after his interest in Michigan, found places to loan money, and appeared to be the agent of Wightman here in all his business transactions. Wightman finally took the loan on the farm of Mortimer D. Gardner in 1871, which was to run five years, for the sum before mentioned.

On or about November 14, 1881, while Wightman was at the house of Amilo Gardner on one of his semi-annual visits and business, it appears that Mortimer wanted a loan of $100 from Wightman, and called upon him at his father's house, some little distance from his farm, upon which he resided. The wife of Wightman was then with him, and objected to her husband making the loan to Mortimer, but finally, under her husband's direction, drew up the note for $100, which Mortimer signed, and received the money.

Mr. Amilo Gardner says that after this transaction he told Mr. Wightman that Mortimer felt pretty bad about his affairs with him, and at what Katherine had said, when Wightman said he would go down to Mortimer's house, and see him about it; that he went, and was gone about an hour, and when he returned he said he had made it all right with Mortimer; that he had given him a writing which made everything all right with him; but he did not know what kind of writing he had given him until after Wightman died.

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Mr. Amilo Gardner further says that during all these years he had made no charges against Wightman for his staying there, and that Wightman said if he outlived him he would do well by him and his family.

The daughter of the defendant, now 19 years of age, testified that she remembered Mr. Wightman coming to her father's house on one occasion, when a paper was given from Wightman to her father. He came in the house and asked for paper, pen, and ink. Her father got the paper, but Wightman did not like the piece given to him, took some from his pocket, wrote upon it, and then read it. While she could not tell how it read, she did remember that Wightman then said in five years it would discharge the mortgage; all they had to do was to go to Howell, pay 10 cents, and have it discharged. She then saw the paper. The paper was handed to her father, and she afterwards saw the paper in the house, and, being shown the paper heretofore set out, says, "That looks like the same paper." Some words were written on the back of the paper, which the daughter says were put on by her mother the same day the paper was given her father.

Mr. Clarence Tinker, an attorney residing at Fenton, Genesee county, was called as a witness by the defendants, and testified that this contract signed by Mr. Wightman was exhibited to him by defendant Mortimer D. Gardner in February, 1882, and that Mr. Gardner then consulted him in regard to it, and what it was best to do with it; that he took it, inclosed it in an envelope, indorsed upon the envelope, "M. D. Gardner; to be delivered to him in person only," and then went with Mr. Gardner, and deposited the same in Mr. Buckbee's bank at Fenton.

The envelope, with this contract, was exhibited to him, and the witness says the indorsement on the envelope, as above, is in his handwriting, and made by him on the day above

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stated,—February 2, 1882. This was before the death of Mr. Wightman.

A large number of witnesses were examined by the defendants, many of whom had seen Mr. Wightman write, and were familiar with his handwriting, who testified that the paper under which defendants claimed the mortgage was satisfied and discharged was in the handwriting of Mr. T. A. Wightman,—the body of the paper as well as the signature. Testimony was also given by the defendants tending to show that Mr. Wightman stated at different times that he intended to do something for Mortimer.

Dr. Aaron W. Riker testified that Mr. Wightman told him in 1881 that Mortimer had assisted him, and he was going to reward him for it.

Mr. Harrison T. Love testified that three days before Wightman died he told him that he had fixed it in black and white so Mortimer and Sarah could not be turned out of doors.

Mr. Elisha Griswold testified that in the fall of 1881, at Fenton, Mr. Wightman told him that Mortimer had done a great deal for him; that, though he had only one team, he would take it off the wagon or plow, and go with him to assist him in any business transaction; that he had never in all these years paid Mortimer anything; and that the mortgage he intended to fix before his death so that no parties could turn Mortimer and Sarah out of doors. He said he had some time before fixed a discharge on Mortimer's farm, but that his wife objected, and he had to change it for the time being; but that he intended, before his death, to have it the same as it was before.

Mr. George Russell testified that Mr. Wightman told him that Mortimer had always done a good deal for him, helping in his business; that Mortimer was all right now, and that he had something to show that he was all right now.

The complainant claims that these witnesses are not

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worthy of credit, and gave some testimony tending to show contradictory statements made by some of them out of court to other parties. Complainant gave testimony, also, tending to show that Mr. Wightman some time before his death had lost confidence in Mortimer, and did not intend doing anything for him. Some considerable testimony was also given by complainant by witnesses as to the handwriting of Mr. Wightman; some by persons who had seen Mr. Wightman write, and others by comparison of the paper with other writings and signatures of Mr. Wightman, conceded to be genuine. These witnesses give opinions that the paper in question is not in the handwriting of Mr. Wightman.

The complainant took the testimony of Mrs. Katherine Wightman, by commission, in Herkimer county, New York, as well as several other witnesses there. Mrs. Wightman produced an unsigned paper writing on her examination, and the same was put in evidence, and reads as follows:

"To whom this may come.

"I hereby agree that the mortgage I hold against M. D. Gardner and on said Gardner's farm in Tyrone, Livingston county, Michigan, the interest the next five years from date is to be seven per cent., providing the interest is paid annually on all sums unpaid on said mortgage.

"*Tyrone, Oct. 21, 1881.*"

Mrs. Wightman testified in relation to this paper that in November, 1881, while she and her husband were at the house of Amilo Gardner, she heard Mortimer D. Gardner say to her husband that his father had given him the use of 20 acres of land, and if he (witness' husband) would reduce the interest on the mortgage to 7 per cent. he could make money enough to pay up the mortgage in about five years; that soon after the conversation her husband informed her that he had given Gardner a writing reducing the rate of interest upon this mortgage to 7 per cent., and that her husband then handed her the paper, which he said was a copy of the paper he had given to Mortimer, and asked her to copy

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it, and preserve such copy so made by her with the other papers relating to the mortgage, which she did, all but the signature.

This is the copy made by Mrs. Wightman, and in her handwriting, which is above set out.

The claim of counsel for complainant here is that, if Wightman gave Mortimer a paper such as his wife now testifies to, Mortimer drew or caused to be drawn from it, imitating the handwriting of Wightman, the paper which he now produces, and under which he claims a discharge of the mortgage.

It will be noticed that the two papers read exactly alike down to and including the word "Michigan."

Counsel for complainant also claim that on the examination before the commissioner Mortimer D. Gardner was asked to make a copy of the paper under which he claims; that such paper was dictated to him, and an examination shows that several words so written by Mortimer are misspelled, and that a comparison of this paper with the one in controversy shows that the same words are misspelled in the paper under which claim is made, but in the two papers the words are spelled exactly alike.

Mrs. Wightman testified that Mr. Wightman usually spelled his words correctly, except that he abbreviated the word "received," but that he alwa s spelled "annually" correctly. The word "whom," in the paper in controversy, is spelled "whoom," and the word "record" is spelled "reccord."

The word "whom," in the copy made by Mortimer on the hearing, is spelled "hoom," but the word "record" is spelled "reccord," the same as in the paper.

It is a curious fact, however, that, notwithstanding the testimony of Mrs. Wightman, her husband was not in the habit of spelling his words correctly, and the same errors of spelling appear in the papers used as exhibits in the case, which

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are conceded to be in Mr. Wightman's handwriting; so we cannot attach any importance to the manner in which the words are spelled in this paper.

Our attention, however, is attracted to the phraseology of these two papers. The one produced by Mrs. Wightman is only a copy made by her of a paper which she says her husband said was a copy of a paper given Mortimer. No explanation is given why the one shown her by her husband was not put with the mortgage, and preserved; and it is not produced, or in any manner accounted for. In this copy produced by her, following, as it does, the one in controversy down to and including the word "Michigan," it seems from there on not to have a very fitting termination, while the paper in controversy connects smoothly with what precedes.

It appears also that some time before the commencement of this suit the defendants gave to the complainant a copy of the paper in controversy, which was sent by him to Mrs. Wightman; so that it is as easy to believe that the paper exhibited by Mrs. Wightman was made from this copy sent her by complainant, and the latter part of it changed, as to believe the one produced by defendants was manufactured over from an original which read as the one produced by Mrs. Wightman.

A great amount of testimony is produced, and the record is quite voluminous. The solicitors for the respective parties had certain theories, to meet which witnesses were produced upon either side. We are asked to say upon this record that Mortimer D. Gardner forged this paper, or procured it to be forged. The evidence not only falls short of proving this fact, but the circumstances surrounding the case, and the testimony of the witnesses who had the means of knowing, convince us that the paper is genuine, and satisfy us of the entire innocence of Mortimer D. Gardiner of so great a crime.

It would not be profitable to go over the whole testimony,

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as from an examination of the whole record we are led to the above conclusion, and this conclusion is reached without an examination of the testimony of Mortimer D. Gardner and his wife, which complainant's counsel claim to be incompetent under the statute.

We have not discussed this question, as it is wholly immaterial to the result, the other testimony presenting facts conclusive in their nature of the genuineness of the paper in controversy.

The decree of the court below must be affirmed, with costs of both courts.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. SHERWOOD, C. J., did not sit.

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THE PEOPLE, EX REL. PETER ROESER ET AL., v. OWEN GARTLAND, MODERATOR, ET AL.

Schools and school districts—Territorial limits of district—Election of officers—Quo warranto.

1. The writ of *quo warranto* is a proper remedy where not only the existence of a school district, but the title of its officers, is attacked, these questions being judicial in their nature, and not within the jurisdiction of the township board.
2. How. Stat. § 5033, limiting school districts to nine sections of land, means an *acreage* equal to nine full sections according to the United States survey.
3. The provisions of law relative to the election of school-district officers by *ballot* are mandatory.
4. Where school-district officers were unanimously chosen by a *viva voce* vote at a meeting regularly called, and qualified and were acting as such at the time of the institution of *quo warranto* proceedings in the interest of the public, no other persons claiming to have been elected, the Court reversed a judgment of ouster and dismissed the writ.

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Error to Menominee. (Grant, J.) Argued June 5, 1889. Decided June 7, 1889.

Information in the nature of a *quo warranto* to test the title of school-district officers. Respondents bring error. Judgment of ouster reversed, and writ dismissed. The facts are stated in the opinion.

A. C. Cook, prosecuting attorney (*Phillips & Thompson*, of counsel), for relators.

R. C. Flannigan, for respondents.

CHAMPLIN, J. An information in the nature of *quo warranto* was filed against the respondents, requiring them to show by what authority school district No. 3, of Ingallston, in the county of Menominee, exercises the franchises of a school district, and the respondents held, used, and exercised the offices of the district respectively.

The school district in question is bounded on one side by Green bay, and by reason of the meandering nature of the shores of the same the sectional territory bound by it is largely fractional. The residents of the district are for the most part fishermen. They all reside on the shores of the bay, and on the fractional sections.

The district was formed by the board of school inspectors about April 12, 1888, and, as formed, contains five full and eight fractional sections of land, aggregating 5,707 acres, or 53 acres less than what is represented by nine sections of land.

Subsequent to the formation of the district, the clerk of the board of inspectors drew up and delivered to the respondent Louis Garbosky, an inhabitant of the district, the notice required by How. Stat. § 5034, describing its boundaries, and fixing the house of the respondent Robert Beattie as the place, and the fifth day of May, 1888, as the time, for holding the first district meeting therein; which notice was served in due time and form upon every qualified voter in

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the district. At the time and place appointed for the first district meeting every qualified voter in the district appeared and participated, with one exception, the exception being the relator Peter Roeser. At this meeting, and by the vote of every qualified voter thereat, the respondents were elected to the offices which they now hold, and thereupon accepted and qualified. The vote, however, by which they were so elected, was *viva voce*, and not by ballot.

The notice drawn up by the clerk of the board of school inspectors, and delivered to Louis Garbosky, was not recorded by the clerk, nor was it or the return of service thereon recorded by the director as required by section 5034. The notice, with the return of service thereof, was present at the meeting, and in the hands of the chairman thereof, and was by him delivered to the director elected thereat, as required by law. The director pinned it in the record-book of the district, but afterwards removed it therefrom, and handed it to the supervisor of the township, who lost it.

January 21, 1889, the information in this cause was exhibited and filed.

The record presents three general questions:

1. May the relators proceed in this form, instead of by appeal to the township board?
2. Was the district lawfully formed?
3. If lawfully formed, was it lawfully organized?

1. We think the writ of *quo warranto* a proper remedy under the facts and circumstances of this case. The relators attack, not only the existence of the school district, but the right of the persons named to exercise the offices of moderator, assessor, and director. These are questions which the township board could not deal with, being judicial in their nature.

2. We think the prohibition of the statute relative to the territory which may be included by the inspectors in the formation of a new district, refers to the extent of the territory

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and was intended to allow them to include a quantity of land not exceeding nine full sections.[1] The object of the statute is to allow the inspectors to embrace within the district sufficient land upon which taxes may be laid to support schools, build school-houses, and defray the ordinary expenses, without being burdensome to the tax-payer; and also to bring the remotest residents of the district within such proximity to the school-house as to enable their children to attend the school.

Now, in the case before us, the eight fractional sections contain only 2,507 acres of land, and if another full section were added there would be 3,147 acres in the district; while in a district composed of nine full sections there would be 5,760 acres. It may very well happen that if the inspectors must be confined to the eight fractional and one full section in marking the boundaries, the district so formed may not contain territory to enable the district to build a school-house or support a school without greatly and unjustly overburdening the tax-payers in the district.

Upon consideration of the whole subject, we construe the statute to authorize the inspectors to include in a school district contiguous territory not exceeding nine full sections of land according to the United States survey.

We think the school district was legally laid out and established by the board of school inspectors.

3. The provisions of law relative to the election of school-district officers by ballot are mandatory, and must be observed The respondents were not legally elected to the offices they assume to hold and exercise. It does not, however, follow that they should be ousted from their offices. There are no persons who claim to have been elected to these offices. The writ in this case is invoked, not in the interest of any private person, but in the interests of the public, and for public purposes. We should therefore exercise or refuse to exercise our

[1] How. Stat. § 5033.

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power over the writ and proceedings in such manner as shall best promote the public interests.

These officers were chosen unanimously *viva voce* at a meeting regularly called. They have qualified and are acting as such. They are officers *de facto,* and the public interest requires that they should not be disturbed.

We think that the judgment of the circuit court should be wholly reversed, and the writ dismissed. No costs will be allowed to either party.

The other Justices concurred.

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JAMES KELLY AND BENJAMIN DOREMUS v. JAMES T. EMERY ET AL.

Province of jury—Charge of court.

1. The *weight* to be given to testimony is for the jury, and it is their province to determine whether that of one witness overbalances that of another.
2. An instruction which, after referring to the testimony of two witnesses upon a given point, informs the jury that the testimony of one of them "very materially modifies that of the other," held prejudicial, and ground for reversal.
3. A statement that the case had been once tried, that the amount involved was not large, and that neither the parties nor county could afford to have the parties litigate forever, coupled with a wish that the jury might be able to arrive at a conclusion and settle the facts in the case, is simply an admonition to agree, which the court might very properly make.

Error to Bay. (Cobb, J.) Argued January 31, 1889. Decided June 14, 1889.

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Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

T. A. E. & J. C. Weadock, for appellants.

A. McDonell, for plaintiffs.

LONG, J. This is an action of assumpsit brought to recover the balance claimed by plaintiffs to be due them under a written contract for building a schooner for defendants at Bay City, and for extra work and material thereon.

On the trial in the court below the plaintiffs had verdict and judgment for the sum of $224.78.

Defendants bring error.

Under the contract the vessel was to be delivered in the water on or before April 15, 1887. The full price for the building of the vessel was to be $1,800. It is conceded that prior to the commencement of the suit the defendants had paid to plaintiffs the full contract price, less $174.78; and the action was brought to recover this sum under the contract, and also to recover $100 for extra work and material in making a bilge-strake half an inch thicker than the contract required.

The declaration was on the common counts in assumpsit, with a bill of particulars, claiming the $174.78 under the contract, and the $100 for extra work and material for the bilge-strake not provided for in the contract.

The defendants, with their plea of the general issue, gave notice of several matters of defense, as defective construction of the schooner, and also that the same was not completed on April 15, 1887, nor did plaintiffs ever complete it, but threatened to keep the same on the stocks until July thereafter, doing a trifling amount of work each day; and defendants were compelled to lay out large sums of money in order to make the same seaworthy and fit for use.

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These damages defendants claimed in said notice to recoup on the trial.

The defense was that the vessel was unseaworthy when delivered to defendants, and that they were compelled to pay out this $174.78, kept back from the plaintiffs upon her, in order to make her seaworthy, and that they were not liable for the extra work done by plaintiffs in putting on the bilge-strake.

Defendants also claimed damages at the rate of five dollars for each working day beyond the time when the vessel should have been completed by plaintiffs, that being claimed as the value of the use of the vessel.

Defendants also claimed damages by way of recoupment for the difference in the value of the vessel as she was constructed by plaintiffs, and what she would have been worth if constructed in a workmanlike manner.

On the trial plaintiffs gave testimony tending to show that defendant Donahue took charge of and looked after the work of building the vessel, and that they followed his directions; that Donahue went to the ship-yard, and selected the timber and planks for the vessel, gave directions about its construction, and that they followed the instructions given by him in building her; and that, while the contract only called for 2½-inch plank, under Donahue's direction they put on 3-inch.

Plaintiffs also gave evidence tending to show that the vessel was launched and delivered in the water April 16, and that the first load hauled by her was stone, and that the extra work on her was worth $100.

Plaintiffs also claim that work was done on the vessel by them after she was launched that could not have been done before.

The defendants put in evidence a receipt from C. Wheeler, who owns the dry-dock, showing a payment to him by the defendants on June 24, 1887, of the $174.78, which they kept back from the contract price.

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This was made up of the following items:

Docking	$30.00
136 lbs. oakum	20.40
1¼ days foreman, $8.75; 55 ft. oak, $1.65	10.40
75 lbs. tallow, $7.50; 31¼ days labor, $96.75	104.25
85 lbs. spikes, $1.75; 8 lbs. iron, 32 cents	2.07
50 lbs. paint, $4.00; 22 ft. decking, 66 cents	4.66
Blacksmithing	3.00
	$174.78

Testimony was given by defendants showing this work was worth the prices charged, and that the work was necessary to make the vessel seaworthy. Testimony was also given tending to show that the putting on of the bilge-strake was not worth the amount charged.

Defendants also gave evidence tending to show that the difference in value between the vessel as built and the vessel as it was to be built under the contract would be from three to five hundred dollars.

Defendant Donahue was called as a witness, and gave evidence tending to show that plaintiffs did not do the work according to the contract; that the vessel was not properly caulked, and that inferior material was used; that the planking was not driven up to the frames, and had to be cut out; that plaintiffs worked upon her to June 1; that defendants then took her, and went to Grindstone City for stone; that the vessel would carry 24 to 25 cords of stone, 140 tons, but that they only put on 21 cords, properly stowed, and while being loaded she began leaking through her seams, which were not properly caulked; that she leaked a stream as large as one's hand, so that they were compelled to pump her out.

Defendant further testified that the value of the use of the vessel from the opening of navigation to June 2 was from five to six dollars per day, and that they had use for her all that time.

Plaintiffs in rebuttal introduced testimony tending to show that it was usual for new vessels to leak, and that Don-

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ahue supervised the building of the vessel. There was also evidence tending to show that the vessel was built in a good and workman-like manner.

The theory and claim of the defendants, as well as the claim of the plaintiffs, was submitted to the jury by the court.

The court instructed the jury as to the claim of the plaintiffs as follows:

"Now, the plaintiffs claim here $174,78 for the balance of this contract price. It is conceded that this has not been paid to them, and they also claim that the defendants, after the work was commenced, wanted a bilge-strake put on half an inch thicker than the contract called for, and that they did it at their request, and that the difference between the two was one hundred dollars; so that the plaintiffs claim both the $174.78 and the $100, making $274.78. That is the outside limit of the plaintiffs' demand here, and the outside limit of any verdict that you can give them, under any circumstances."

Referring to the claim of the defendants, the court instructed the jury:

"The defendants claim three different items:

"For the $174.78 they paid to Mr. Wheeler, claiming that it was necessary to do it in order to get the vessel in such shape as to make her fit to use.

"They also claim damages for not having the use of the vessel. * * * * * * * * * * * * * * * * *

"They also claim for the difference in the value of the vessel built as she was built, and the value that she would have been if she had been built according to the contract. * * *

"What the law aims at in this case, and all other cases of this kind, is compensation, and no more. Each party should be made good for any loss he has suffered by the wrongful fault or neglect or delay of the other party. If either party failed to do what he agreed to do, and by that failure the other party has suffered loss, then the party in default ought to make good that loss, and that is all he is required to do."

No complaint is made of these portions of the charge of

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the court, but counsel for the defendants contend that the court was in error in charging the jury as follows:

"Then these defective deck plank, a specimen of which has been shown here. The testimony is very conflicting upon that, and of course you have got to find out and determine, in order to arrive at a verdict, whether these deck planks were proper to be put into a vessel or not. Mr. Wheeler, who appears to be a very intelligent man, and to be very well versed in the business, gives his version of it. Capt. Davidson, who seems to be also an equally intelligent man, and equally well up in the business,—his testimony modifies that of Mr. Wheeler very materially in that respect."

This latter portion counsel for defendants contend was an intimation by the court that the testimony of Davidson modified or overbalanced that of Wheeler, and that the defendants were prejudiced by such statement.

It is well settled that the weight to be given to the testimony of any witness is for the jury, and it is their province to determine whether the testimony of one witness overbalances that of another.

We think this language of the court is susceptible of the construction contended for by counsel for defendants, and might be construed as an intimation from the court that they were to give greater weight to the testimony of Mr. Davidson than to that of Mr. Wheeler. It was a statement that they did not agree in their testimony. We think it a very strong intimation that the jury should, in considering the testimony of Mr. Wheeler, take into consideration the fact that Mr. Davidson's testimony modified it, and therefore they should not give it that credit which they otherwise might. At least this portion of the charge is open to that construction, and we think may have prejudiced the defendants' case.

Defendants' counsel also insist that the court erred in charging the jury as follows:

"This case has already been tried once, and the amount

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involved is not very large, and the parties cannot afford to litigate it forever, and the county cannot afford to have them do it. You see it takes some time to try the case, and I hope you will be able to arrive at a conclusion, and settle the facts in the case, at least."

It is claimed that by this charge the jury were coerced into finding a verdict.

This statement by the court could not have had any such effect. It was simply an admonition to the jury to agree, if possible, upon the facts of the case, and one which the court might very properly make.

It appears that the case had once been tried, and on that trial the jury failed to agree, there being such a conflict of testimony.

We do not see how this portion of the charge affected the verdict, or had any influence in favor of or against either of the parties.

It was important in that, as in other cases, that the jury settle the disputed questions of fact arising on the trial; and the court, without intimating its opinion of the facts upon this part of the case, advised the jury that it was for the best interests of the parties, and would save costs to the county, if they could in that trial settle the facts in the case. No one could be prejudiced by this portion of the charge.

Some other errors are alleged upon the manner of the examination of witnesses by plaintiffs' counsel, and to the admission of testimony by the court under objection of defendants' counsel, but we do not deem them of sufficient importance to discuss them.

While it may be true that defendants should have been allowed some of the claims set up by way of set-off and recoupment of damages, yet these were matters of fact for the determination of the jury, and under a proper charge they must determine them.

Defendants' counsel characterize the verdict as a most extraordinary one, and it may be so, but the most of the mat-

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ters involved are purely questions of fact, which, under proper instructions from the court, it is the province of a jury to determine.

For the error in the charge referred to the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

SUPERINTENDENTS OF THE POOR OF NEWAYGO COUNTY v. SWAN NELSON.

Pauper—Order for removal to Michigan—Support—Civil action.

1. An order of an Iowa court made pursuant to its statute,[1] directing the removal of a pauper, who has not gained a legal settlement in that state, to Michigan, her former place of residence, is no justification to the person who executes it, if such removal is in violation of the statutes of this State.
2. A suit to recover for the support of a pauper illegally removed from another state into a county in Michigan is properly brought in the name of the superintendents of the poor of the county, but will not lie until after the pauper is adjudicated such, nor until expenses for such support have been paid, or the liability therefor incurred, by such superintendents.
3. A conviction for a violation of the provisions of How. Stat. § 1776, must precede a suit to recover the forfeiture of $50 provided for in said section, and until the defendant is so convicted, and required to indemnify the county against liability for the pauper's support in case he fails to remove the pauper from the State, he is under no obligation to give said bond, nor will a suit lie against him for such non-removal.

Error to Newaygo. (Palmer, J.) Argued February 13, 1889. Decided June 14, 1889.

[1] McClain's Stat. (Iowa) § 1354—"A person coming from another state, and not having become a citizen of nor having a settlement in this state, falling into want and applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the circuit court or judge; otherwise he is to be relieved in the county where he applies."

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Case for support of pauper claimed to have been illegally brought into this State, etc. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George Luton (*E. L. Gray*, of counsel), for appellant.

W. D. Fuller (*J. H. Standish*, of counsel), for defendant.

SHERWOOD, C. J. This suit was commenced in the county of Newaygo against the defendant, as he was about to leave the State and return to his home in the state of Iowa, to recover for support furnished to a pauper, who had been brought into the county by the defendant from Iowa, with the intent, as is alleged, to make the county of Newaygo chargeable for her support. The declaration reads as follows:

"The superintendents of the poor of the county of Newaygo and State of Michigan, plaintiffs in this suit, by George Luton, their attorney, and prosecuting attorney of the said county of Newaygo, complain of Swan Nelson, defendant in this suit; the said Swan Nelson having been duly summoned to answer the said plaintiffs of a plea of trespass on the case.

"For that the said defendant, heretofore, to wit, on the seventh day of December, A. D. 1887, did bring, fetch, carry, and remove one Margaret Boss, a poor and indigent person, to wit, a pauper, from the county of Pocahontas, in the state of Iowa, into the said county of Newaygo, with intent to make the said county of Newaygo maintain, support, and be chargeable with the maintenance and support of the said Margaret Boss as such pauper so removed by the said defendant from the said county of Pocahontas; and after the removal of the said pauper into the said county of Newaygo, at, to wit, the township of Garfield, in said county of Newaygo, requested the said plaintiffs to take charge of, maintain, and support the said Margaret Boss, the pauper aforesaid, at the proper charge and expense of the said county of Newaygo; and the said defendant did leave the said Margaret Boss in the said county of Newaygo as such pauper, with intent that she be cared for by said plaintiffs at the charge and expense of the said county of Newaygo, after the said defendant had been requested by said plaintiffs to remove, carry, and take back the said Margaret Boss to the

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said state of Iowa, and to remove her from the said State of Michigan, and which the said defendant wholly neglected and refused to do.

"And that the said Margaret Boss, after such neglect and refusal on the part of the said defendant, not having any means of any kind whatsoever with which to support herself, applied to said plaintiffs for support and maintenance, to be paid for and become chargeable upon the said county of Newaygo, after she had been so removed as a pauper by the said defendant from the said county of Pocahontas in the state of Iowa; and that she as such pauper, upon the application so made by her and said defendant, the plaintiffs were compelled to and did take charge of her, the said Margaret Boss, she being the such poor and indigent person as aforesaid, and were obliged to and did remove the said Margaret Boss to the said poor-house of the said county of Newaygo, where she has ever since and is now and liable to be, for the period of her natural life, supported, aided, and maintained by the said county of Newaygo, owing to the wrongful act of said defendant in so bringing, carying, and removing said pauper into the said county of Newaygo, be and remain a charge thereon.

"*Whereas*, in truth and in fact, the said Margaret Boss never became nor was a charge upon the said county of Newaygo, nor any township therein, as a poor and indigent person or otherwise, and the said defendant was often requested to remove said pauper from said county of Newaygo and State of Michigan, but has wholly neglected and refused to do, and still neglects and refuses to do so, to the damage of said plaintiffs ten thousand dollars, and therefore they bring suit.

"GEORGE LUTON, Plff's Atty.

"E. L. GRAY, of Counsel."

To the declaration the defendant pleaded the general issue, and gave notice that he would show in his defense that, if he removed the pauper named from Iowa into Newaygo county, he had the right so to do.

That prior to December, 1886, she resided with her child in said county, where she was abandoned by her husband, and that in that month she was furnished with money to transport them to the state of Iowa, where she went about that date, and before gaining a settlement in that state, under the laws thereof, she came to want, and was obliged to apply to

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the proper authorities there for assistance, and did so, and such proceedings were had as resulted in the district court of Pocahontas county making an order for the removal of the said pauper to Newaygo county, where it was adjudged her residence at that time was, and that such removal should be at the expense of the county in Iowa.

That said order required the removal to be made on or before January 1, 1888, and was delivered to the defendant, a supervisor of the county, and by virtue thereof he removed said pauper to said Newaygo county, and tendered her to one of the superintendents of the poor of said county; that he paid all expenses for her removal, and left her in said county; that he left her at the place of her former home in said county of Newaygo, which he claims was her legal residence, and paid all her expenses up to the time he left, and that the plaintiff subsequently sent her to the poor-house in said county of Newaygo.

The cause was tried before Judge Palmer, without a jury, who, after hearing the testimony, gave judgment for the defendant.

No findings appear in the record, except that contained in the judgment rendered, but all the testimony is given, which was all offered by the plaintiff.

Counsel, in making his opening, read the declaration, and claimed upon the facts therein stated the plaintiff would be entitled to recover, and therefore commenced to make his proofs.

Counsel for defendant objected to taking any testimony in the case, for the following reasons:

"1. The declaration fails to state a cause of action against said defendant.

"2. If the declaration states a cause of action, the suit should have been brought in the name of the county of Newaygo, or of the board of supervisors in its behalf.

"3. A complete statutory remedy is provided by How. Stat. §§ 1776, 1777, for the wrongs charged in plaintiffs' declaration."

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The court overruled the objection, and the plaintiff proceeded in putting in its testimony.

Charles Mitchell was sworn, and testified that in the fall of 1886 he sent the pauper, whose name is Mrs. Boss, to her brother in Pocahontas county, in the state of Iowa. Up to that time she had lived in Newaygo county, and had never been a pauper, nor a county or a township charge. She resided in the town of Goodwell. She lived with him some of the time, and her brother-in-law took care of her part of the time. He lived in Goodwell also. He went to Iowa in the spring, and Mrs. Boss went in the fall, of 1886, and her brother furnished her the money to go with.

Several other witnesses were sworn for plaintiff, whose testimony showed that, before going to Iowa, Mrs. Boss had never received any aid from the town or county as a poor or indigent person, and she never applied for any, but she worked some, and was able to work and support herself. Among the witnesses sworn was the supervisor of the town where she lived, and the superintendent of the poor.

The latter testified that on the fifth of December, 1887, the defendant called on him, and informed him that he had a pauper whom he had brought from Iowa under the order of the district court there, and presented the order, and that he had left her and her child at the depot in Newaygo; that she had been adjudged a pauper by the court in Iowa.

That when defendant left for Iowa he left Mrs. Boss and her child with a Mrs. Jarse, who notified the witness that they had been left there without means, and Mrs. Jarse asked him to take them, and the superintendent took them to the county poor-house, where they have ever since remained.

Witness further testified that Mrs. Boss was not capable of taking care of herself at that time, and that she is a confirmed pauper, and that Nelson told him she had been adjudged a pauper; that it is worth about $150 a year to sup-

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port Mrs. Boss, and $1.50 per week to support her child; and that it will be about one year before the child will be able to take care of herself, and that Mrs. Boss never will be. He also testified that the county had supported her 37 weeks, and that it was worth $111, and worth half that sum to support her child.

The foregoing testimony, relating to Mrs. Boss being a pauper, and to the worth of her support and the support of her child, was objected to by counsel for defendant as incompetent and immaterial, for the reason that the declaration does not disclose a cause of action.

Counsel for the plaintiff then moved to amend his declaration by inserting after the words "Margaret Boss," wherever they appear therein, the name of her child, and the court declined to grant the motion.

The supervisor testified that Mrs. Boss was not a pauper; was not a pauper when she went to Iowa, nor had she been prior thereto; and could have supported herself by her work if she had desired to, and she worked out part of the time. Her brother-in-law took care of her some until he went to Iowa.

When defendant asked plaintiff to receive Mrs. Boss and her child, the superintendent refused to receive her. He claimed defendant was liable for bringing a pauper within the county, and had defendant arrested three times under the statutes relating to that subject, but these prosecutions failed.

The foregoing is the substance of all the testimony given, and when it was closed the defendant's counsel moved for judgment in his favor of no cause of action, for the reasons stated in his objection made to the admission of any testimony on the part of the plaintiff, with the result hereinbefore stated.

By statute the superintendents of the poor have charge of all the poor "who may be" in their county (How. Stat. §

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1759), and it is their duty to cause them to be maintained at the place designated by the board of supervisors, and if no place has been designated, or poor-house erected, they may designate the place, and lease property for that purpose. See first subdivision of same section. They may also draw upon the county treasurer for such necessary expenses as may be incurred for that purpose. See seventh subdivision of same section.

The superintendents of the poor in this State are a corporation by that name, and by statute are given the usual powers of a corporation for public purposes. How. Stat. § 1758. Among these is the right to sue and be sued.

The superintendents of the poor of a county from which a pauper has been improperly removed into another county, with the intent to charge wrongfully the liability for his or her support, may be sued by the superintendents of the latter for such support. See How. Stat. § 1770.

Section 1776, How. Stat., provides that—

"Any person who shall bring or remove, or cause to be brought or removed, any poor or indigent person, from any place without this State into any county within it, with intent to make such county chargeable with the support of such pauper, shall forfeit and pay fifty dollars, to be recovered before any justice of the peace of the county into which such pauper shall be brought, or in which the offender may be, and shall also be obliged to convey such pauper out of the State, or support him at his own expense."

The next section provides that the justice or court before whom the offender shall be convicted for a violation of the preceding section may require him, if he fail to transport the pauper out of the State, to give satisfactory security, within a reasonable time, to pay to the county all charges and expenses which have been or may be incurred in the support of such pauper, and, if such person or offender shall neglect or refuse to give the required security, it then becomes "the duty of the justice or court to commit him to the county jail for a term not exceeding three months."

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It is claimed that these provisions of the statute authorize the proceedings in question against the defendant, and that judgment should have been given for the plaintiff.

I think the fact that Mrs. Boss was a pauper sufficiently appears, as well as the fact that she was brought into Newaygo county by the defendant with the intent of making her support chargeable to the county. The direction of the district court in Iowa to defendant to thus bring her here cannot be regarded as any legal justification for defendant's so doing. And I further think that, were it not for the fact that Mrs. Boss' indigent condition is admitted by the defendant, an adjudication that she is a pauper would have been necessary before plaintiff could have brought any suit for her support.

I have no doubt but that the suit may be brought in the name of the superintendents of the poor. The subject is one over which the plaintiff has complete control, and whatever sums may be recovered are to be paid to the county treasurer and credited to the poor-fund.

But I have been unable to find any statute making the defendant liable to plaintiff or the county until expenses for support have been paid, or the liability therefor incurred, by the plaintiff.

In the present case the suit was commenced on the nineteenth of December, 1887, and the pauper was brought into the county only 12 days previous, and up to the time of bringing this suit defendant paid all of her expenses. Certainly no liability of plaintiff had accrued up to that time.

This suit is not brought to recover the forfeiture of $50, provided for by the statute for bringing the pauper into this State. That could only be claimed of defendant after he had been convicted (How. Stat. § 1776), and which had never occurred. It is, however, claimed by counsel for plaintiff that the defendant is liable in case he fails to indemnify the

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county against liability for the pauper's support, and that he is liable in this action for her prospective support. In this case no such adjudication for indemnity was made or indemnity required of defendant, and the defendant was under no obligation to give the indemnity until judicially required, and the amount fixed by the court. And it will be noticed that it is only when the defendant refuses to remove the pauper from the State that he may be made liable for her support, and whenever he causes such removal to be made his liability ceases. Such being the case, it would be most unjust to give plaintiff a judgment against the defendant for such prospective support. I cannot believe the Legislature ever intended that to be done. Such being the views taken of the several statutes before referred to, we are unable to discover any ground upon which a recovery can be had in this action, and the judgment rendered at the circuit must be affirmed.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred.

MORSE, J., concurred in the result.

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HATTIE S. BUSS v. ESTATE OF JANE A. BUSS.

75 163
f121 579

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e125 82

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d127 697

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134 501

Estate of deceased person—Final account of executor—Settlement of estate.

A (*solvent*) estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until he has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate evidence in some form of such facts.

So *held*, where without such payment the executor's final account was allowed, but no order made for his discharge, and the petition of a residuary legatee showing such non-administration, and the existence of both real and personal estate to be administered, and praying for the appointment of an administrator, to complete such administration, was denied.

Error to Kent. (Judkins, J., presiding.) Argued February 5 and 6, 1889. Decided June 14, 1889.

Order of probate court, affirmed in circuit court, denying petition of residuary legatee for appointment of an administrator to complete the administration of an estate, reversed, and circuit court directed to enter the order prayed for, and certify same to probate court. The facts are stated in the opinion.

Tatem & Quinsey, for appellant.

William Aldrich Tateum, for estate.

SHERWOOD, C. J. Jane A. Buss, on the twenty-fifth day of August, 1879, made her last will, disposing of all of her property, and made David M. Woodward her executor.

She died on the twenty-fourth day of September, 1884, and her will was admitted to probate in the county of Kent on the seventh day of January, 1886, and the executor named in the will was duly appointed as such, and entered

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upon its execution, after giving the bond required by the judge of probate.

He filed an inventory of the estate, and appraisers were duly appointed, who returned an appraisal of the estate, showing real estate of the value of $14,840, situate in Grand Rapids, and consisting of lots and parts of lots, with water-power and buildings thereon, used for manufacturing machinery in connection with a foundry; also showing personal property belonging to the estate of the value of $4,549, consisting of tools, machinery, etc., situate on said lots.

The inventory, with the appraisal, was duly filed, and commissioners to adjust claims against the estate were duly appointed, who made return of the indebtedness allowed by them on the third day of November, 1886, to the amount of $5.12.

There were mortgages upon the property, upon which there was owing by the deceased at the time of her death about $5,000.

On the thirteenth day of November, 1886, the executor filed what purported to be his final account, from which it appears that the total value of the real and personal property, after the payment of all debts and expenses, and after the payment of the first five legacies named in the will (which amounted to $1,003), was $19,389.

There were three other legatees named in the will, who were to receive one-fourth of the property after the payment of the debts and expenses, and after the first-mentioned five legatees had received payment in full of their legacies, and who claim never to have received their legacies, or any part thereof.

The will further provided that, after the payment of the foregoing eight legacies, Hattie S. Buss should receive the remainder of the estate of the testatrix.

The will also provides that the property of the estate should remain undivided, and the business in which it was

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then used might be continued by her husband and her sons, without payment of rent or otherwise, until the first day of January, 1885, and that her executor should hold the property in trust for that purpose until that date, when such trust should terminate.

It was under such circumstances that the said account of the executor was filed and asked to be allowed.

A day was set for the hearing, and proper notice given thereof, at which time, no one appearing to object, the judge of probate allowed said account as the final account of the executor; but the decree contains no order discharging the executor.

This decree was made on the thirteenth day of December, 1886.

The executor died on the twenty-third day of October, 1887.

The residuary legatee, Hattie S. Buss, on the thirty-first day of October, 1887 filed her petition, alleging that said estate has not been fully administered, that both real and personal estate remain to be administered, and praying for the appointment of an administrator to complete the administration of the same.

A hearing was duly had upon said petition before the judge of probate, who entered a decree dismissing the petition, on the ground that said estate had already been duly administered.

The petitioner took an appeal from the decree to the circuit court for the county of Kent, where a rehearing was had, and a like judgment was entered as that made by the probate judge.

Petitioner now brings the case to this Court by writ of error.

The account and proceedings on the accounting show that the debts are not all paid, and that the legacies are not all

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paid, and therefore the administration of the estate was not fully completed.

It nowhere appears to have been adjudicated whether there was any estate left for the residuary legatee, and this amount, if any, could not be known until the estate was fully administered, and the debts and the other legatees were all paid.

The petitioner has a right to have this done. She does not seek by her petition to reopen the account of the executor already settled and adjudicated, but asks that she may have the aid of an administrator in her endeavors to ascertain her interests, and the extent thereof, under the will; and this is a right of which no legatee can be deprived. Neither the decree of the probate court nor the order of the circuit court finds that the estate has been fully administered, nor that the legacies have all been ascertained or paid. That of the probate court is to the effect that the account is correct.

No order will be regarded as finally disposing of the duties for an administrator in the settlement of an estate if the probate records show property undisposed of belonging to the estate, and debts or legacies remaining unpaid.

An estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until he has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate, in some form, evidence of these facts.

We think the probate court should have granted the prayer of the petitioner under the showing she made in this case, and that the circuit court should have so held, and the action taken in both of said courts dismissing her petition must be set aside, and the prayer contained therein must be granted, and the circuit court will enter an order accordingly, and certify the same to the probate court, and petitioner will be allowed to recover her costs in this Court and at the circuit against the respondents.

The other Justices concurred.

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EDWIN D. BLAIR, ADMINISTRATOR, ETC., v. FRANK L. CARPENTER, TRUSTEE, ETC., ET AL.

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d126 680

[TWO CASES.]

Payment—Application—Evidence—Indorsement of amount of second mortgage upon first—Foreclosure—Statute of limitations.

1. A debtor owing two or more debts to a creditor, to whom he makes a payment, may direct its application, but in the absence of such direction the creditor may apply the payment upon whichever debt he pleases.
2. Evidence showing that a second mortgage was intended to be applied as a payment upon a prior one is admissible.
3. The indorsement by a mortgagee of a second mortgage, executed by the mortgagor and another, as a payment upon the first mortgage, under an agreement that it should be so treated, comes within the provisions of How. Stat. § 8729, and saves the debt from the operation of the statute of limitations.
4. Payment may be made in any mode which the parties agree shall be treated as the equivalent of a money payment.

Appeal from Ottawa. (Dickerman, J., presiding.) Argued April 3, 1889. Decided June 14, 1889.

Bills to foreclose two mortgages. Defendant Carpenter appeals. Decrees granting relief sought affirmed. The facts are stated in the opinion.

Blair, Kingsley & Kleinhans, for complainant.

Frank L. Carpenter, in *pro. per.*, for appellant.

LONG, J. The bills in these cases are filed to foreclose two certain indentures of mortgage. The two cases were heard as one in this Court, and the rights of all the parties are so connected that they may be disposed of together. The first bill alleged substantially that Myron Harris, now

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deceased, in his life-time, and on the twenty-seventh day of September, 1858, made and delivered his promissory note to Francis Alvord, dated October 1, 1858, for $1,000, payable one year after date, with interest at 10 per cent., and to secure the payment thereof made and delivered to him an indenture of mortgage of even date upon the north-east quarter of section 22, township 7 north, range 13 west, township of Talmadge, Ottawa county, containing 160 acres of land, the execution of which mortgage was duly acknowleged on that date, and on the same day it was recorded.

That Francis Alvord was a resident of Onondaga county, New York, and departed this life there on February 10, 1885 [1] and his son, Charles G. Alvord, having been appointed administrator of his father's estate in that county on January 3, 1885, presented a petition for the appointment of the complainant as administrator of said estate to the probate court for Ottawa county, this State, and the appointment of complainant was duly made.

That on September 1, 1880, Myron Harris, who was a resident of Ottawa county, departed this life, leaving his last will and testament, which has been duly probated in said county of Ottawa; that by said will Myron Harris nominated and appointed as executors thereof and as trustees thereunder his wife, Miriam Harris, Frank L. Carpenter, and Israel V. Harris; that Miriam Harris departed this life September 13, 1880, never having qualified or acted as trustee under said will; that Frank L. Carpenter never qualified as executor; and that Israel V. Harris duly qualified as executor thereof, and that letters testamentary were duly issued to him by the probate court of Ottawa county; and that Frank L. Carpenter and Israel V. Harris are the surviving trustees thereunder.

That on February 23, 1870, Myron Harris paid upon said

[1] The second bill alleges Alvord's death as of February 10, 1884.

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mortgage the sum of $1,706; that no other payments have ever been made thereon for either principal or interest, and that there now remains due upon said note and mortgage the sum of $1,082.82.

This bill further charges that the Stilwell & Bierce Manufacturing Company, Rollin H. Pelton, and Israel V. Harris, in his own right and as trustee and executor, and Frank L. Carpenter as trustee, have or claim to have rights and interest in said premises as subsequent purchasers or incumbrancers or otherwise.

The bill in the second case charges that on February 23, 1870, Myron Harris, now deceased, and Israel V. Harris, being indebted to said Francis Alvord, made, executed, and delived to him a certain other indenture of mortgage for the consideration of $1,456, and by said mortgage granted and conveyed to said Alvord the north-east quarter of section 27, township 7 north, range 13 west, township of Talmadge, Ottawa county, Michigan; that said mortgage was duly acknowledged, and recorded in the office of the register of deeds of Ottawa county, and that there remains due and unpaid thereon the sum of $2,983.10.

The bill also sets out the death of Francis Alvord, the appointment of complainant as administrator, etc., the death of Myron and Miriam Harris, the making of the will by Myron Harris appointing the above named parties as executors and trustees thereunder, and that Israel V. Harris qualified as such executor; that Myra Harris, Lucy C. Harris, and I. Victoria Harris, as well as the Stilwell & Bierce Manufacturing Company, Israel V. Harris, and Frank L. Carpenter, have or claim to have rights and interest in these premises as subsequent purchasers or incumbrancers or otherwise.

These two bills were filed on the same day, and such proceedings were had that jurisdiction was had by the court of the person of all the defendants.

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The defendants Myra Harris, Lucy C. Harris, and I. Victoria Harris are infants, and appeared by guardian *ad litem* duly appointed.

Frank L. Carpenter also appeared and answered the bill in each cause.

No contention is made by the answers of Frank L. Carpenter of the making and delivering of these mortgages, though their execution is not admitted.

The claim in the answer is, as to the first-mentioned mortgage, that no payment was ever made thereon of any amount, and that, if said note and mortgage were ever valid and subsisting contracts, the same have not been such within 15 years immediately prior to the death of Myron Harris, and within that time have never been considered by the said Myron Harris and Francis Alvord as valid and subsisting contracts, but, on the contrary, the said note and mortgage are stale, dead claims, having no basis in equity, and all right of action thereon is and has long since been barred by the statute of limitations, and that the infant children of Myron Harris, viz., Myra Harris, Lucy C. Harris, and I. Victoria Harris, have the beneficial interest in said lands.

By the answer of Frank L. Carpenter to the second bill it is denied that there is now due upon the second mortgage the sum of $2,983.10, or that any sum whatever is due thereon from the estate of Myron Harris, or that said mortgage is a valid lien upon the premises described therein, and it alleges that, if said mortgage ever had any validity as to said Myron Harris or his estate, all right of action upon the same is barred by the statute of limitations. The answer also sets out the interest of these minor children of Myron Harris in these premises.

Testimony was taken before a circuit court commissioner in these causes, and on the hearing the court found due and unpaid upon the first-mentioned mortgage the sum of

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$1,200, and that the same is a valid and subsisting lien upon the premises therein described.

The court also found due and unpaid upon the second mortgage the sum of $2,200, and that it is a valid and subsisting lien upon the premises therein described. Decree was duly made in each cause ordering a sale of the premises for the payment of such sums and costs.

From these decrees the defendant Frank L. Carpenter appeals.

It appears that the defendant Israel V. Harris was called as a witness for the complainant on November 17, 1885, and testified to the genuineness of the note and mortgage first given by Myron Harris. The witness was then shown the second mortgage, dated February 23, 1870, given for $1,456, and testified that the signatures thereto were the genuine signatures of Myron Harris and himself, and that said mortgage was given for the interest on the first mortgage, and that there was never any interest paid on the first mortgage until the second mortgage was given, and that no interest has ever been paid upon either of the mortgages since the second mortgage was given, and that at the time the second mortgage was given there was no cash paid, and no other payments have been made upon these mortgages.

On his cross-examination the witness testified substantially that he and his brother, Myron Harris, were engaged together in the lumbering business in Talmadge for 30 years, and that he had an intimate knowledge of Myron's financial circumstances; that he had no knowledge of Myron's receiving any money on the first mortgage, and at that time Myron was more or less pressed with debts; that this mortgage and note were in his (witness') handwriting, were made at Talmadge, and mailed to Alvord at his home in New York; that Alvord and Myron married sisters. On the date the second mortgage was given—February 23, 1870—an indorsement appears upon the first mortgage of $1,706, made as this

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witness says, in the handwriting of Francis Alvord, and that Myron received no money from Alvord at that time, and was hard up, and pressed with debts; that the second mortgage was drawn in Myron's handwriting, at Talmadge; and that it is his recollection that when this second mortgage was given it paid up all the back interest on the first mortgage.

The complainant then gave in evidence the mortgages and note with the above-mentioned indorsement upon the first mortgage.

It appears that the case here rested until July 29, 1886, when Israel V. Harris was again examined before the same commissioner, a stenographer being called in to take the testimony. A stipulation appears in the record by which the solicitors for the respective parties appear to have agreed to the taking of such testimony. Mr. Harris was examined in chief by complainant's solicitor, and cross-examined by the defendant Frank L. Carpenter, who appeared as the solicitor in the two causes for the defendants. On this examination Israel V. Harris appeared very reluctant to answer the questions, and was pressed many times with leading questions. Some complaint is made by defendant's solicitor of this mode of examination, but from an inspection of the record we think under the circumstances this course was justified.

On this examination it appeared from the testimony of Mr. Harris that he and his brother, Myron, were interested together, not only in the lumber business carried on at Talmadge, but also at Grand Haven, at which place Israel V. had the charge and management. It is admitted by Israel that Myron had money invested there in the business, and the inference is very strong from this examination that during these years he and Myron were partners in their lumbering business.

The witness was asked to state whether he had any understanding with Mr. Alvord with reference to taking care of the first mortgage or the interest upon it, and stated that he

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could not remember any special understanding with Alvord, but Alvord knew he acted for Myron and himself, and intended to pay as fast as he could, and felt what he did for Myron was all right.

The witness was here shown three letters written by himself to Francis Alvord, which will be referred to again hereafter. The second letter inclosed the second mortgage referred to herein to Mr. Alvord, and the third letter states that he incloses a draft for $250, to apply on interest on the mortgage.

The witness, on his cross-examination, testified that all the recollection he had of this payment was from the letter, and that when he gave his evidence before in the cause he had no recollection of this payment, and that he could not now state which mortgage the $250 was to be applied upon, only his opinion was that it was to be applied upon the mortgage signed by him,—the second mortgage,—but that he could not say that he gave any directions further than as stated in the letter accompanying the draft how or upon which mortgage the money was to be applied.

The following are the letters referred to:

"GRAND HAVEN, Feby. 14, 1870.

"F. ALVORD, ESQ.;
"Liverpool, N. Y.—

"*Dear Sir:* Yours received some time since, and should have been much sooner answered. If apologies were of any avail I should feel that I ought to make many to you, but I am well aware that what you want, and what you ought to have, is pay, and that is what I have expected to bring about, and this is my only excuse for not having sent you the promised security long since.

"I am running a lumbering job at Stern's Bayou, and have hardly been home since I received your letter. I will attend to the matter the first time I go home. Money matters are very tight here, and but poor show for selling real estate at present, but our R. R. is prospering *all right*, and I think in the spring we shall see a very different show for Grand Haven. I am getting in a nice lot of logs, which I shall get into market early in the season, and am in

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hopes to realize something handsome for the timber; and as soon as I can get hold of some money that I dare spare I will promise to pay you at least a part of it, etc.

"Yours truly, I. V. HARRIS."

"GRAND HAVEN, March 1, 1870.

"F. ALVORD, ESQ.,—

"*Dear Sir:* I inclose mortgage on N. E. ¼ sec. 27, T. 7 N., R. 13, which is a part of Myron's sheep farm, and is ample security for the amount named in the mortgage. Myron figured up the old mortgage, and made the amount due to this date at 10 per cent. compound interest, $1,456.

"I hardly know what will be the correct way to fix this so that there would be no question as to how this matter stands to any one, but would suggest that you indorse on the old mortgage or note interest paid to this date by giving a new mortgage to cover interest, and to send us an acknowledgement to that effect.

"Money matters are decidedly tight here, and business dull, but I think the prospect for Grand Haven and vicinity is very flattering. I have got along so far that I think I can see through until the opening of navigation, when those interested in lumber generally believe they will be all right. I have had several *nibbles* by way of purchasing some real estate we have, but have not succeeded in selling but small amounts, but am sanguine that Grand Haven property is going to sell soon. Have got in a nice lot of logs at a low figure, and am in hopes to realize something from them, although I expect lumber to be low.

"All well. I wish to be remembered to Mrs. Alvord and the other friends at L.

"Hoping to hear from you soon, I am,

"Yours truly, I. V. HARRIS."

"GRAND HAVEN, Feb. 18, 1873.

"F. ALVORD, ESQ.,—

"*Dear Sir:* I inclose draft for $250, to apply on interest due on mortgage. It is the best I can do at this time.

"I have deferred answering yours received some time since, hoping to get hold of some money to pay, instead of making another mortgage. I have several ways by which I expect to get some money for you, but may be disappointed, as money matters are very close here. At the worst I can promise you some soon after the opening of navigation, as I have quite a lot of stuff on hand that will bring money at some price. I have some twenty men and ten teams at work, and am at my

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wits' ends as to how I am going to get through to the opening of navigation, unless I can sell some property.

"We are under many obligations for your indulgence, and hope to be able to make restitution, and that soon.

"Please remember me to Mrs. Alvord and the other friends at L.

"Yours truly, I. V. HARRIS."

It appears that this $250 was included with the amount of the second mortgage of $1,456, and indorsed as a payment upon the old mortgage as $1,706, and of the date of February 23, 1870.

The principal question in the case is whether this second mortgage was given and received in payment and satisfaction of the interest which had accrued on the first mortgage, so as to save that mortgage from the operation of the statute of limitations.

It is claimed by the solicitor for the complainant that I. V. Harris was the agent of Myron Harris, so that the latter will be bound by the acts and admissions of his brother, Israel V. Harris, especially the admissions contained in the foregoing letters.

Upon the death of Israel V. Harris the foreclosure case of the second mortgage was revived as against his heirs, for the reason that he had title of record to the mortgaged premises derived from Myron Harris subsequently to the mortgage in foreclosure.

It is contended by the defendant that the first mortgage was given without consideration, and as a cover by Myron Harris to keep off his creditors.

Defendant also raises another question in his brief, relative to the depositions of Israel V. Harris, which are contained in the record. A motion was made to the court below by defendant to suppress these depositions. Several grounds were set out in the affidavit in support of this motion, the principal one being that the defendant did not have notice of the calling in of Mr. Harris to have the same read

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over to him before signing, the deposition having been taken before a stenographer, in short-hand, and then copied from these minutes so taken, and the copy made signed by the witness; also that he did not have notice of the filing of either of the depositions.

A stipulation was also annexed to the last deposition, which defendant denied having agreed to, it being taken down by the stenographer by dictation at the time of taking the deposition, and returned by the commissioner as a part of the proceedings before him, as admissions of counsel.

Many of these statements contained in the affidavit of defendant are met and contradicted by other affidavits, and the whole matter was presented to the court below and passed upon, and the motion denied. It appears that, upon each of the occasions of examination of Mr. Harris, Mr. Carpenter appeared as solicitor, and had full opportunity to cross-examine the witness. This cross-examination is contained in the record.

We are not satisfied that any injustice has been done by the refusal of the court to suppress them. Mr. Harris died after these depositions were taken, and before the cause was brought on for hearing in the court below, and, considering all that is shown by the record here, which we have carefully examined, we think the court very properly overruled the motion, and admitted the depositions in the case.

What were the business relations between Myron Harris and his brother, Israel? Israel Harris, in his testimony, says:

"I cannot say what our relation was except that I sometimes acted for him, and sometimes for myself. It is a legal question which I cannot answer whether we were partners."

It appears that while these two brothers were not ostensibly partners, yet Israel V. Harris sometimes acted for Myron, and did this without special authority upon every occasion, and in each special action, but no objection was

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ever made by Myron, so far as the record discloses, when knowledge of such action was brought home to him. They worked and acted together, as this witness describes it. In the fall before the last mortgage was given Alvord visited Myron at Talmadge. Israel saw him, and talked over with him the old mortgage and its unpaid interest, and the giving of another mortgage on other property for that interest; and Israel afterwards saw Myron, and talked over these matters and his interview with Alvord. He says the talk with Alvord the fall previous was about giving a new mortgage for the interest on the first one, and says:

"I must have talked with Myron about the second mortgage before it was given, and I think I talked with him about my talk and understanding with Alvord. I have a distinct recollection that I talked with Myron Harris about the giving of the second mortgage. I cannot tell exactly when or where it was."

The latter mortgage was signed by both brothers, and sent to Alvord with the letter of Israel V. under date of March 1, 1870. The body of this mortgage is in Myron's handwriting, and they were together when it was signed. It was then intrusted to Israel V. Harris to forward, and he, pursuant to the talk had before that, and under the terms of the letter inclosing it, sent it to Alvord, by whom it was received and accepted as payment, and so indorsed on the mortgage in Francis Alvord's own handwriting. Under these circumstances we think this was sufficient evidence of the agency of Israel V. Harris to bind Myron, and that he is bound by the acts and the admissions of his brother, Israel V. Harris, contained in the letters. And it is quite clear that it was the intention of the parties that this mortgage was to operate as a payment upon the first mortgage, and to settle the interest thereon to that date.

Our attention is called by the defendant to the fact that in any manner of computation the amount of interest on the

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old mortgage to that date is not the amount stated in the second mortgage. But Israel explains this in his letter inclosing the mortgage, when he says:

"Myron figured up the old mortgage, and made the amount due to this date at ten per cent. compound interest, $1,456."

The manner of his computing the interest is not stated. It appears, however, that the interest at 10 per cent. compounded would have been a much larger sum. Alvord, however, received it, and made the indorsement as requested in the letter, and Israel says:

"It is my opinion that Mr. Alvord received the second mortgage understanding that it was to clear up the back interest on the first mortgage, and pay that."

The decree made below gives credit upon the first, not only for the face of the new mortgage, but also for the $250 paid in 1873. This $250 in the decree made is also credited upon the second mortgage, so that the question as to which mortgage it should have been credited upon does not arise, except in so far as it might operate to take it out of the statute of limitations.

There was no direction as to where this $250 was to be applied, whether upon the first or second mortgage. It was intended to be applied upon one or the other of them. In the absence of any such directions the mortgagee had the right to apply it to whichever he chose. A debtor owing two or more debts to a creditor, to whom he makes a payment, has a right to direct to which debt it shall be applied, but, in the absence of any such direction, the creditor may apply the payment to whichever debt he pleases. *Pennsylvania Co's Appeal*, 7 Atl. Rep. 70; *Magarity v. Shipman*, 82 Vir. 784 (1 S. E. Rep. 112, note and cases there cited); *Shelden v. Bennett*, 44 Mich. 634 (7 N. W. Rep. 223). The first mortgage was due September 27, 1859, and, unless there was a payment made upon it, all action was barred

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upon it before this suit was commenced. How. Stat. § 8709, provides that—

"No suit or proceeding shall be maintained to foreclose a mortgage on real estate, either at law or in equity, unless commenced within fifteen years from and after such mortgage shall become due and payable, or within fifteen years after the last payment was made on said mortgage."

The allegation in the bill is that Myron Harris paid upon said mortgage $1,706 on February 23, 1870. It is shown that he gave a mortgage to Mr. Alvord on that date of $1,456, upon another piece of land, and that on February 18, 1873, his brother, Israel, sent a draft to Alvord of $250, to apply upon one or the other of these mortgages. The second mortgage does not, in terms, refer to the first, but proofs are given showing that it was intended as a payment on the first. Defendant claims that this proof is inadmissible. We think this proof admissible, and, if this second mortgage was intended as payment, its legal effect was to bring the first mortgage out of the operation of the statute of limitations. The statute is not a bar if suit is commenced within 15 years after the last payment was made on the mortgage.

Payment, in its more restricted sense, is the discharge in money of a sum due,—the performance of a pecuniary obligation. To constitute payment, money or some other valuable thing must be delivered for the purpose of extinguishing the debt, and must be received for that purpose. 2 Greenl. Ev. § 516, and note. Payment may be made in any mode which the parties agree shall be treated as the equivalent of a money payment. It may be by means of anything of value which by mutual consent is given and accepted on account of or in satisfaction of the debt.

As stated by Mr. Justice Elliot in *Weir v. Hudnut*, 115 Ind. 525 (18 N. E. Rep. 24):

"What the parties agree shall constitute payment the law will adjudge to be payment. It is competent for parties to

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designate by their contract how, and in what, payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value."

No peculiar signification is given to the term "payment." Section 8725, How. Stat., requires the acknowledgment or new promise to be in writing, but section 8729 expressly provides that the act shall not in any way alter the effect of any payment of principal or interest made by any person It is held that no unusual meaning is to be attached to the word "payment," used in that section of the statute.

In *Maber v. Maber*, L. R. 2 Exch. 154, it was held that whatever would satisfy a plea of payment in an action brought directly for the recovery of the debt would be a payment sufficient to bar the statute of limitations. This same doctrine is also laid down in Wood, Lim. § 112, p. 243; *Blanchard v. Blanchard*, 122 Mass. 528; *Goenen v. Schroeder*, 18 Minn. 66.

Here the agreement and arrangement was that the new mortgage should be treated as a payment of the interest to that date on the old mortgage. It was indorsed by the mortgagee as a payment, in accordance with the request of Israel V. Harris, acting in behalf of his brother, and he (Israel) being one of the makers of this new mortgage. This comes plainly within the provisions of the statute, and must be treated as a payment, so that action upon the mortgage would not be barred by this statute.

But, even if this were not so, the payment of the $250 in 1873, and the indorsement of that as a payment upon the old mortgage, under the circumstances, would operate to save the mortgage from the statute of limitations.

Some claim is made here that the evidence tends to show that this first mortgage was given as a cover. We are not satisfied that the evidence tends to show this. The fact that

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Israel V. Harris had no actual knowledge that Myron received the money upon it does not establish the fact that it was given without consideration. The mortgage itself imports a consideration paid. A note was given with it, and in the talk between these brothers, and between Israel V. Harris and Alvord, it was treated as a valid and subsisting mortgage. The acts of Israel V. Harris and his letters to Alvord all tend to show that all the parties looked upon the first mortgage as a valid one. The evidence tends to show a valid mortgage, rather than one given as a cover.

We are satisfied from all the circumstances surrounding the case that the court below reached a correct conclusion, and the decree in each case made must stand. These decrees will therefore be affirmed, with costs.

The other Justices concurred.

JOSEPH H. TOMPKINS v. C. ELDEN JOHNSON ET AL.

Taxes—Certificate of officer—Evidence—Return of marshal—Sale.

1. *Statutory* certificates of taxing officers cannot be contradicted in *collateral* proceedings. *Blanchard v. Powers*, 42 Mich. 619; *Gamble v. East Saginaw*, 43 Id. 367.

2. A return by the marshal of the city of Grand Rapids of his inability to find any personal property in the possession of the person chargeable with the payment of taxes, out of which to collect the same, is a *condition precedent* to a valid sale of the land upon which said taxes are assessed, and in the absence of such return the existence of such personal property may be shown to defeat such sale.

3. The validity of the provision of the charter of the city of Grand Rapids requiring the marshal to levy upon *any* personal property found *on the premises* assessed, to satisfy such assessment, is questioned, but not decided.

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Appeal from superior court of Grand Rapids. (Burlingame, J.) Argued April 4, 1889. Decided June 14, 1889.

Bill to cancel a tax-deed on payment of purchase money, etc. Decree reversed, and one entered directing the cancellation of the deed upon payment of the amount paid upon the sale, with interest, and in default said deed to stand confirmed. The facts are stated in the opinion.

J. H. Tompkins, in *pro. per.*, for complainant.

John S. Lawrence, for defendant Johnson.

James W. Ransom, for defendant Belknap.

CHAMPLIN, J. The bill of complaint states that Joseph H. Tompkins is the owner of a parcel of land in the city of Grand Rapids, bounded as follows:

"Beginning on the south line of Leonard street, fifty feet east from the east line of Turner street; thence east, along the south line of Leonard street, one hundred feet; thence south, parallel with Turner street, ninety-six feet, to the south line of lot nine, J. F. Chubb's addition; thence west, along the south line of lots nine and twelve of said addition; thence north ninety-six feet to the place of beginning; being a part of lots 9, 11, and 12 of said Chubb's addition."

The city of Grand Rapids assessed these premises to defray the expenses of constructing a sewer in Leonard street.

The above boundaries include 65 feet in width off the east end of lots 11 and 12, and 35 feet off the west end of lot 9, of J. F. Chubb's addition. The premises were assessed in three separate parcels. The parcel on lot 11 is designated in the record before us as "A;" that on lot 12 as "B;" and that on lot 9 as "C." No question is made as to the regularity of the assessments or sale, so far as the proceedings by the officials of the city are concerned.

The charter of the city declares that the assessment shall be a lien upon the premises until the same is paid or satisfied, and that deeds on sale of real estate for delinquent assess-

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ments, executed and acknowledged as prescribed, shall vest the fee of the land in the purchaser, and shall be deemed and taken to be *prima facie* evidence of the existence and regularity of all such prior proceedings as might otherwise be required to be proven in order to establish a title in the purchaser.

Any land sold for assessments may be redeemed within one year after the date of sale by paying to the city clerk the amount for which it was sold, with interest on the same from the date of sale to the time of redemption at the rate of 25 per centum per annum.

The assessment laid upon the above parcels of land was not paid, and they were duly advertised, and sold on the ninth day of February, 1885. Parcel "C" was sold to the defendant Johnson. This parcel was not redeemed, and a deed was duly executed and delivered to Johnson, who went into the possession thereof.

Tompkins claims in his bill that he failed to redeem through the fault and neglect of defendant Belknap, who was city clerk; that on the fourth of December, 1885, he applied to the defendant Belknap, and obtained from him a certificate showing what liens were upon his premises on account of said assessment, and was furnished by said Belknap with a certificate, signed by him as city clerk, which did not show that there was any lien upon parcel "C," which certificate contained a statement as follows:

"I do not find any other liens on the above parcels of land."

He alleges that he relied upon this statement, and made no further investigation, and that in March, 1886, he had an opportunity to sell the land, when he discovered the tax deed to Johnson; that he tendered Johnson $25, and requested him to convey to him, but he refused. He alleges that the deed is a cloud upon his title. He states that he is ready and desirous to remove said cloud, and repay to said Johnson the

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amount of money he has justly and lawfully paid to the city in the purchase of said parcel, and the legal costs of the same, with lawful interest thereupon; and he prays that the deed to Johnson may be canceled and set aside upon the repayment to him of said money, costs, and lawful interest, and for further and other relief.

The bill also contains charges that there was sufficient personal property on the premises to satisfy the assessment, and also that he had personal property in his possession subject to seizure and sufficient to satisfy the assessment; also that the premises were wrongly described upon the assessment roll, and that the return of the marshal was illegal and incorrect, and not in accordance with the law and facts of the case; and also that the sale and deed to Johnson were illegal.

Concerning these several charges no specific relief is prayed other than that above stated.

We think the complainant has utterly failed to establish the statements of his bill with reference to his being misled by the certificate obtained from the city clerk. The testimony shows that he knew of the assessment while the roll was in the marshal's hands for collection, and it shows beyond a doubt that at the time he obtained the certificate he knew of the lien upon parcel "C;" that his attention was called to it at that time; that he requested the clerk not to include this parcel in the certificate; that the clerk made out a redemption certificate dated that day, but Tompkins did not redeem it that day, but stated that he would in a few days, and the clerk promised to hold it for him a few days, and, having confidence that Tompkins would in a few days call and redeem it, gave to Tompkins, at his request, the certificate showing the parcel clear of the lien. This is fully established by the testimony of Uhrbrock and Belknap, who produces the redemption certificate of this parcel which he drew up at that time.

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The testimony shows that one Seigel had some wood piled upon parcel "C," but that Tompkins had no ownership of nor interest in the wood. Seigel was not a tenant of Tompkins, but had obtained permission to pile wood there from Uhrbrock, who had Tompkins' permission to occupy the premises.

Mr. Tompkins also testified that he had some personal property consisting of an office-desk, chairs, and books in his office, and also that the marshal never called upon him, or demanded payment of the assessment.

The charter of the city provides that the common council may authorize the mayor to attach his warrant to the assessment roll, directing the marshal to collect such assessments within the time to be fixed by the council, "and thereupon it shall be the duty of the marshal, and he is hereby given full power and authority, to levy and collect the same by distress and sale of any personal property upon such premises or in the possession of the persons chargeable with such assessment, and in case sufficient personal property cannot be found whereon to levy for the satisfaction of such assessment" the marshal within five days pay over the money collected, and make a report in writing, certified by him, to the clerk, of the sums unpaid, and for the satisfaction of which he was unable to find personal property, with a description of the premises on which the same was assessed. Section 28, tit. 6, of the charter reads as follows:

"The common council may, by an order entered in their minutes, at any time direct the marshal that on the return of his roll, or on any roll already returned by him, he shall give to the city clerk a list of the real estate upon which the assessments have not been paid or collected, and state to whom each parcel of said real estate was assessed, or that the same was assessed to a person 'unknown,' and describe said real estate, and give the amount of tax, together with the percentage added by the common council upon each parcel, and the city marshal shall in all respects comply with the same, and he

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shall annex thereto a certificate, substantially in the following form:

"'I hereby certify that the above list contains a true and accurate statement of each parcel of real estate, and the assessment and percentage thereon remaining unpaid, and the names of persons to whom each parcel was assessed; and I further certify that I have been unable to find any personal property upon any of the parcels above described, in the possession of the person or persons chargeable with said assessment, out of which to levy and collect the same, or any part thereof.'"

In this case the return of the marshal was in the exact language contained in the form given above.

The defendants claim that it cannot be disputed in this collateral proceeding between Mr. Tompkins and the purchaser at the sale.

It has been decided in this State that certificates of taxing officers, required by the statute to be made by them, cannot be contradicted in a collateral proceeding. *Blanchard v. Powers*, 42 Mich. 619 (4 N. W. Rep. 542); *Gamble v. East Saginaw*, 43 Id. 367 (5 N. W. Rep. 416).

But the testimony in this case showing that Mr. Seigel had personal property on parcel "C," and also that Mr. Tompkins had personal property in his possession in his office, does not contradict the marshal's certificate. Had the certificate conformed to the evident design of the statute, it would have been indisputable in this proceeding. The statute declares it to be the duty of the marshal to—

"Levy and collect the same by distress and sale of any personal property upon such premises, *or* in the possess on of the persons chargeable with said assessment." Section 10, tit. 6.

And it is only in case sufficient personal property cannot be found whereon to levy that he is authorized to return the land as delinquent. Section 10 and section 28 of this title must be construed together.

It was never designed that land could be returned as delinquent, and sold, if the person against whom it was assessed

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had personal property in his possession within the jurisdiction of the marshal out of which he could levy and collect the assessment. The marshal must perform his duty in this respect before he is authorized to return the land.

In the form given, which must be substantially followed, the most casual reading in connection with section 10 will show that the word "or" is omitted after the word "described" in the last clause, and that by inserting the word "or" it will correspond with the duty required of the marshal by section 10, and make sense of the certificate, which without it is nonsense, and would authorize the marshal to return as delinquent any real estate upon which the person chargeable with the assessment did not happen to have personal property in his possession upon the premises assessed, although he might have a store full of personal property upon the adjoining premises.

Unless the return of the marshal shows that he was unable to find any personal property in the possession of the person chargeable with the assessment, the fact that there was personal property in possession of such person out of which it might have been levied and collected may be shown to defeat a title acquired on a sale of the land as delinquent. Such fact is jurisdictional, and it lies at the foundation of the authority of the ministerial officer to sell, under the charter of the city.

I question the authority of the marshal to levy upon Mr. Seigel's property to pay Mr. Tompkin's assessment, but, as it is not necessary to decide this point, we shall pass it, and base our decision upon the fact which is made to appear, that Mr. Tompkins had sufficient personal property in his possession out of which the marshal might have collected the assessment, and that the return of the marshal does not negative this fact. We shall therefore reverse the decree of the court below, and a decree will be entered directing the deed of Mr. Johnson to be canceled upon the payment to him, or to the

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clerk of the superior court for him, within 30 days after this cause is remanded to that court, the amount which he paid upon the sale of said parcel, with interest at the legal rate, and in default of such payment said deed to stand as confirmed.

There was no reason for making defendant Belknap a party to this suit, and the bill will be dismissed as to him, with costs of both courts.

Neither the complainant nor the defendant Johnson will recover costs against the other, but each will pay his own costs.

The other Justices concurred.

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WILLIAM W. MOONEY ET AL. v. EGBERT J. DAVIS, ASSIGNEE, AND THOMAS DUDLEY.

Fraudulent sale—Statements made to commercial agency—Account-books—Evidence—Failure of person charged with fraud to be sworn—Charge to jury—Fraudulent representations—Intent.

1. Copies of statements made by its agents to a commercial agency of what a merchant stated to them as to his financial standing, which were written down by them at the time, and which the testimony tends to show were subsequently approved of by the merchant, are admissible as evidence in favor of creditors who claim to have been defrauded by such representations.
2. It is the duty of a merchant who has furnished statements to commercial agencies of his financial standing for the purpose of gaining credit to give them notice of any material change for the worse, to the end that persons with whom he has commercial dealings may not be misled as to the extent of credit they may safely give him.
3. Statements made by an accountant from account-books, in evidence without objection, showing, as claimed, the condition of the owner's business at a given date, are admissible in evidence in connection with said books.

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4. The *presence* of a defendant at the trial of a suit involving his alleged fraudulent representations as to his financial condition, which charge he was at liberty to refute by his own testimony if untrue, and did not do so, is a fact patent to the jury, and an instruction by the court that the plaintiffs were entitled to this circumstance in their favor is not erroneous.

5. The concealment of or misrepresentation as to the real financial condition of a vendee need not be willful nor intended in order to constitute such fraud as will vitiate a sale made in reliance thereon. It is sufficient if they have the effect to defraud.

Error to Wayne. (Reilly, J.) Argued April 5, 1889. Decided June 14, 1889.

Replevin for leather claimed to have been fraudulently purchased. Defendants bring error. Affirmed. The facts are stated in the opinion.

Corliss, Andrus & Leete, for appellants.

Bowen, Douglas & Whiting, for plaintiffs.

SHERWOOD, C. J. Until March 10, 1886, the defendants did business in Detroit, as Dudley, Davis & Co. They were engaged in the wholesale leather and findings business. On that day Dudley succeeded this company, and took its business as such successor, and under the name of the Standard Leather Company carried it on until January 7, 1888, when he made a general assignment to his former partner, E. J. Davis.

The plaintiffs were engaged in the tanning and harness leather business at Columbus, Indiana, in August, 1887. Mooney & Co. received an order from Dudley in July previous for some leather, and on making inquiry at Dun & Co.'s agency for the financial standing of Dudley, and upon the plaintiffs receiving a favorable report, upon which they relied, they filled said order on the fifth of August. It is claimed, and the undisputed testimony shows, that the report made by Dun & Co. was based upon the verbal statement of Dudley to Dun & Co.'s agent, from which the rating was

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made, and which was made in March, 1886, and was to the effect that the defendant's assets then amounted to $39,882, and a mortgage indebtedness upon the real estate of $3,500.

The second sale and shipment of leather was September 9, 1887. In this month the plaintiffs obtained a statement from the agency, and received the same report as in July as to Dudley's financial condition, and it is claimed that it was upon this last report the second shipment was made. Both of these bills were paid for, and none of the goods purchased upon these sales are now claimed for.

In December, 1887, Dudley wished to buy more leather, and at this time plaintiffs consulted Bradstreet's agency as to his financial standing, and obtained a special report, and on this, together with what they had learned through Dun & Co.'s agency, plaintiffs, on the twelfth of the month, sold to Dudley, as they claim, the third bill of goods, amounting to $411.86; and these goods are those for which the present suit is brought in replevin. Dudley's schedules to his assignment showed his assets at the date of that instrument to be $6,377.99, and his liabilities, $9,959.46.

This suit was commenced immediately after the assignment became known to the plaintiffs, to recover the goods sold in December, 1887, who claim that the fraudulent representations made by Dudley as to the credit of himself are sufficient to vitiate the sale of this bill of goods, and to entitle them to a return of their property.

Mooney testified that in making the sale to Dudley his firm made inquiries of Dun's and Bradstreet's agencies, and that in making the last sale they relied upon the reports obtained from them; and the agencies averred that their source of information upon the subject was obtained from Dudley in the statements he gave to their agents.

The plaintiffs were subscribers to the commercial agency of R. G. Dun & Co., and the statements made by Dudley to Dun's agent as to the amount of defendant's property are

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not denied by any one. In the testimony of Bradstreet's agent he says he had a personal interview with Dudley as late as June 17, 1887, in which the latter referred to the statements made to both agencies in March, 1886, and said that there was no material change in the defendant's financial condition from the report then made, and the defendant's rating at that time was from $25,000 to $30,000, and his showing was that he had a surplus of over $36,000.

The books of the defendant were offered in evidence, from which testimony it would appear that Dudley was insolvent at the time the goods in question were purchased.

The defendants offered no testimony upon the trial, and the plaintiffs obtained judgment for the property, with one dollar damages.

The defendants bring the case into this Court, and ask for a reversal of the judgment, assigning 22 alleged errors as grounds therefor.

The principal question in the case is, were the goods in question obtained by the false representations and fraud claimed by plaintiffs?

No question is made upon the pleadings; and, if the defendant Dudley committed the fraud in question in making the purchase, the title to the goods never passed, and the suit was well brought. There was testimony given by the plaintiffs tending to show the misrepresentation and fraud alleged, and the jury have found for the plaintiffs, and it only remains to be seen whether the testimony by which the fraud of the defendant was made to appear was competent, and properly admitted.

It is claimed by defendants that the court erred in admitting copies of the statements of the financial condition and ratings of Dudley made by the agents of Dun & Co. and Bradstreet. We find nothing objectionable in this. It must be recollected that these statements were made by these agents as given verbally by Dudley. They were only statements given by these men of what Dudley told them, and written down at

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the time. The copies offered are of the same kind of evidence as those made at first, but of a different grade. Either was admissible. Neither was ever signed by the defendant, and, but for the testimony subsequently given tending to show his approval of the same, neither would have been admissible.

We further think the testimony tending to show defendant Dudley's approval of these statements was so recent before the sale in question that he must be held bound thereby, or at least, if there had been any material change in his financial standing after the statements were given, he should have notified the agencies to whom the information was given, that persons with whom he had commercial dealings should not be misled as to the extent of the credit they might safely give.

These agencies have become almost a necessity in the transaction of commercial business, and the rules by which they are governed, and the information they gather and impart, are well known to business and commercial men generally, and such information is perhaps more frequently relied upon among such men than that obtained from all other sources, and courts cannot shut their eyes to these facts; and the changes in Dudley's business relations we do not think were such as to affect the question now under consideration. The responsibility and the amount of assets over liabilities available for business purposes, or from which money could be realized for the exigencies of business, were the important questions presented to the creditors, and upon which they made sale of their property.

We think the views here expressed are fully supported by the authorities cited by counsel in their briefs upon both sides, and they need not be herein more definitely referred to.

We see no objection to the use made of the statements taken from the books of Dudley, so long as the books themselves were in evidence, and the record informs us that they

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were, and without objection.[1] Dudley was in court, and was made to attend upon a subpœna by the plaintiffs, but neither party examined him. In the court's charge to the jury he said, among other things:

"Mr. Dudley has been in court during this trial. He knows all about the facts, and he knows whether he has made these representations to the reporters of these agencies or not. He has not deemed it proper to go upon the stand and contradict that in any way, and has remained silent during this trial. That may be considered by you as one of the facts in this case, as to whether the position of the plaintiffs is in accordance with the facts."

The court committed no error in this charge. The fact that the defendant was at the trial, and was at liberty, by his own testimony, to refute the principal facts, if untrue, upon which the fraud was claimed, and did not do so, was a fact patent to the jury, and was not without some effect, and the plaintiffs were entitled to the circumstance in their favor, and this was in substance the charge of the court upon this point.

The defendants' counsel presented the following requests, all of which were refused:

"1. The plaintiffs, in order to recover in this case, must prove that fraud existed on the twelfth day of December, 1887, when this purchase was made, either by willful concealment or misrepresentations of facts by Mr. Dudley, and unless the plaintiffs have established one of such facts they cannot recover.

"2. The defendant E. J. Davis, assignee, is entitled to recover in this case for the value of the goods replevied, $318.08, with interest since January 14, 1888, at 6 per cent., unless you find that the goods were purchased by Dudley December 12, 1887, with intent to defraud the plaintiffs.

"3. Even if you should find from the facts that Dudley

[1] The witness testified that he was an accountant, and familiar with book-keeping and taking details from books; that he had examined the books in question, with reference to the condition of Mr. Dudley's business at a certain date; and such statements were admitted in evidence in connection with said books, which had been received without objection.

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was in fact insolvent December 12, 1887, when the goods were purchased, that would not be sufficient for plaintiffs to recover, unless you also find that Dudley knew it, and made the purchase knowing that he could not pay for them, and with intent to defraud plaintiffs."

The court did right in refusing these requests.

As regards the first, neither the concealment nor misrepresentation need be willful or intended in order to constitute the fraud which will vitiate the contract. It is sufficient if they have the effect to defraud.

The second and third requests have each the like infirmity.

Counsel for defendants, at the close of the charge, asked the court orally to charge that—

"If they find intent to defraud on the part of Dudley, they must find it existed at the time of the purchase of December 12."

Instead of so charging the court said to the jury:

"As to that, gentlemen of the jury, if you believe from the evidence in this case that Mr. Dudley represented himself in March, 1886, to be worth $36,000 or $37,000 over and above his liabilities, and permitted that statement to remain upon the books, and these commercial agencies reported that statement, as it is claimed on behalf of the plaintiffs, down to September, 1887, and these were made, and sales were made by the plaintiffs in December, and the representations as to his financial condition were untrue, you may infer from that the intent on the tenth day of December, 1887, that he purchased the goods not intending to pay for them, and that they were purchased under said fraudulent representations as avoided the contract."

Counsel for defendants, Mr. Corliss, then asked the court to further charge the jury that they cannot assume that the representations made were false, or that any statements that were made were false, except upon positive proof. The court then said further to the jury:

"You may take into consideration the facts in determining that, and you may consider it, gentlemen; you may take into consideration the fact that in September, 1887, as

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claimed by the plaintiffs, the financial condition of Mr. Dudley was represented to them as being the same as it was a few months preceding,—that he had $37,000 over and above his debts and liabilities. Take into consideration the fact that on the seventh day of January, 1888, he failed for several thousand dollars over and above his assets. Take into consideration his financial condition as reported to the commercial world in September, as being as I have stated, and that on the fourteenth day of January, 1888, he failed, showing the liabilities of $3,000 or $4,000 over and above his assets; and, there being no explanation from Mr. Dudley as to what has become of his capital of $36,000 from September to January, you are justified, if you believe that evidence, to find that the defendant was guilty of fraud when he ordered these goods on the twelfth day of December, 1887."

These last refusals and charges were excepted to by defendants' counsel. They were not much argued at the hearing, and not at all in brief of appellant, and we will only say we see nothing in them seriously objectionable, when taken in connection with the other portions of the charge.

We do not think the testimony given by Mr. Foster, nor what the court said while said witness was upon the stand in relation thereto, as to what the testimony did not show as to Dudley's continuing in business, of a character to prejudice the interests of either party, and the exception relating thereto is not well taken.

No error appearing in the record, the judgment will be affirmed.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred.

MORSE, J. (*dissenting*). The evidence in this case shows that the statement of the financial condition of Dudley in 1886 was obtained by one William G. Pungs for R. G. Dun & Co.; that Pungs personally visited Dudley, and procured this statement. I do not think that a merchant who is visited by the agents or *attaches* of a mercantile agency, whether it be R. G. Dun & Co.'s, Bradstreet's, or any other, and who, at

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their request, gives to them a statement of the condition of his business, is bound thereafter to notify such agencies of the financial or other changes in his business; nor is he obligated to inform them if afterwards he is on the verge of bankruptcy, or unable to pay his debts. To so much of the opinion of the Chief Justice as tends in that direction I must dissent.

If a merchant should seek out an agency or its reporters, and give a statement for the express purpose of building up a credit thereon, the case would be different. But a merchant doing business without regard to these agencies, as he has a right to do, who is sought out by such agencies or their employés, and a statement demanded of him, and who in good faith frankly and honestly tells them his business condition, although under no legal obligation to do so, is not thereby bound forever afterwards to keep such agencies informed of his financial standing, any more than he would be had he made a statement to some person not connected with such agencies.

I also think there was error in admitting in evidence a copy of the report in 1886 of the financial standing of Dudley from the books of R. G. Dun & Co. It was not proven that the verbal statement of Pungs of his conversation with Dudley in 1886 was correctly transcribed upon the books of Dun & Co., or that the copy offered in evidence was a true copy of the statement as it appeared upon the books of Dun & Co. Pungs himself testified that all he could remember about the statement was that he went and saw Dudley and had a talk with him. Under such a state of proof the copy was incompetent as evidence.

Thecase ought to be reversed, and sent back for a new trial.

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THE IRONWOOD STORE COMPANY v. SAMUEL A. HARRISON AND S. M. GREEN.

Principal and agent—Evidence—Ratification—Bill of exceptions.

1. In a suit involving the liability of the defendants for goods ordered by an *alleged* agent, orders drawn on other parties, and not in issue in said suit, nor shown to have been filled, nor recognized or paid by the defendants, are inadmissible to prove such agency.
2. The statements of an alleged agent as to his agency, made in a matter not connected with his principal, have no tendency to prove such agency.
3. A bill of exceptions constructed in a connected narrative form, giving the testimony of each witness, and closing with the statement "and thereupon the defendants rested their case," will be presumed to contain all of the evidence bearing on the questions raised. *Hitchcock v. Burgett*, 38 Mich. 501.
4. An agent, in order to ratify the unauthorized act of another agent, must have general power to perform the act which he ratifies, and both must be agents of the same principal, and the agent whose act is in question must have professed to act as the agent of such common principal.
5. An unauthorized act of a stranger may be ratified by the party for whom he assumes to act, but not by his general agent, unless the power of appointing agents has been delegated to such agent.

Error to Gogebic. (Williams, J.) Argued April 5 and 9, 1889. Decided June 14, 1889.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

M. M. Riley, for appellant.

Hammond & Buck (*D. E. Corbitt*, of counsel), for plaintiff.

CHAMPLIN, J. Action for goods sold and delivered.

In the spring and summer of 1887, Harrison & Green were contractors for building about sixty miles of railroad from

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the Montreal river to a point about eight miles from Bessemer, being a portion of the Duluth, South Shore & Atlantic Railroad.

Guidio & Warner were subcontractors, and were to build about eight miles of the road. They were to have their job completed on or before the sixteenth of June.

Plaintiff is a corporation doing business at Ironwood, selling goods and supplies.

One Patrick Nickolson was an agent for Guidio & Warner. He was what was called a "walking boss" or "foreman." His duty was to look after different gangs of workmen, to see if they were doing their duty, and instruct them what to do, but he had no charge over supplies.

About the twelfth of May, 1887, Nickolson ordered a bill of goods from plaintiff, and they were furnished to Guidio & Warner. The goods were delivered to Nickolson by plaintiff, who told plaintiff that Guidio & Warner were subcontractors to Harrison & Green. The goods were not delivered on the twelfth according to the testimony of Mr. Atkinson, who made the sale, for the reason that he did not know Guidio & Warner, and he held the goods until he heard further about them. He saw Nickolson on the sixteenth, and he guaranteed it would be all right; that the goods would be paid for. Some more goods were ordered on the sixteenth, and were all delivered to Nickolson at the same time.

An attempt was made to prove the agency of Nickolson for Harrison & Green. For this purpose the plaintiff introduced as a witness Michael H. Martin, who was engaged in the mercantile business in Bessemer, another village of Gogebic county, who testified that he was acquainted with Harrison & Green, and also with Patrick Nickolson, during April and May, 1887; that from February to and including June he was "walking boss" for Harrison & Green; that the duties of a walking boss are to see that the work of the subcontractors is done according to the contract, but he

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has no charge over supplies; that he had dealings with Harrison & Green during those months; that he delivered goods to Guidio & Warner on both written and verbal orders of Patrick Nickolson; that these goods were paid for by Harrison & Green's pay-master, sometimes by check, and sometimes by cash; when paid for by check, it would come from Milwaukee, signed "Harrison & Green;" that these orders were signed by Patrick Nickolson in his own name, and not as agent for Harrison & Green; that he thought he had the orders still in his possession, and could produce them.

Counsel then submitted to the inspection of witness an order given to Bingham & Perrin, and asked this question:

"Look at that, and see if that is the form of the order you received."

Defendants' counsel objected to the question and testimony as incompetent, which was overruled, and the witness answered:

"It is something similar."

The witness was dismissed, and afterwards recalled, and testified that he had looked for the orders he had testified to the day before, but did not find them, but he thought they were there, as he had seen them not more than five or six weeks before. He testified that he knew Pat Nickolson's handwriting. An order was then shown witness, and he said that he thought it was Nickolson's signature; that he could not swear to it, because he did not see it often enough to know exactly; that he only saw one or two similar to that exhibited to him. In his opinion, it was Nickolson's signature. The order was then offered in evidence. It was dated May 30, which was some two weeks after the goods were ordered from plaintiff. Objection was properly made, but the court, remarking that it was very near the time, permitted the order to be read in evidence, as follows:

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"*Bingham & Perrin:* Please let bearer have barrel of sugar; 100 lbs. lard; one tub butter; one barrel of pork.

"PAT NICKOLSON.
"HARRISON & GREEN."

Another order, dated June 1, 1888, was permitted to be read in evidence to prove that Nickolson acted as agent. It reads as follows:

"OFFICE OF BINGHAM & PERRIN,
GENERAL MERCHANDISE.
"June 1, 1888.

"Please deliver to bearer 15 pairs of blankets, and charge same to Harrison & Green.

"PAT NICKOLSON."

These orders were not in issue in this suit. There was not one word of testimony to show that Bingham & Perrin ever delivered the goods ordered to Harrison & Green, or that they ever knew of the action of Nickolson, or recognized it or paid for them. The testimony was irrelevant to the issue, and should have been excluded. *North v. Metz*, 57 Mich. 612 (24 N. W. Rep. 759).

Richard Gage, a witness for plaintiff, kept a hotel, and knew Nickolson. He testified that he thought that Nickolson was walking boss, and acted as agent for Harrison & Green; that he used to get him to O K his board accounts; that Mr. Harrison told him to be sure to have Mr. Nickolson or Mr. McDougal O K his accounts, and it would save dispute among some of the head men. These board-bills were for men that were going to work for Guidio & Warner. They were bringing a good many men, sometimes as high as 30 or 40 a day. He testified:

"I don't say Nickolson was agent to buy supplies. I say they told me to have Nickolson O K the board bills, and they would be all right."

With reference to these board-bills the testimony of Mr. Bloodgood, who was pay-master of defendants' road, shows that during the progress of the work more or less men were

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sent in to go upon the work, and McDougal arranged to have them kept by the hotel-keepers until they could be sent out on the work. McDougal was authorized to pay for such board, and he paid, on the O K of Mr. McDougal, bills of that nature.

Error was also committed in permitting the witness Haggerson, who was a justice of the peace, to testify that in one or more suits in which Guidio & Warner were interested, but in which Harrison & Green had no interest, Nickolson claimed to be a walking boss for Harrison & Green. Such testimony had no tendency to prove that Nickolson was agent of Harrison & Green. It was showing the statement of a person who claimed to be an agent as to his agency in a matter not connected with his principal. There was no testimony in the case that showed, or tended to show, that Nickolson was a general agent of Harrison & Green, or that he was specially authorized to purchase supplies for them.

The defendants' counsel claims that the testimony is not all returned in the bill of exceptions, and that the presumption in favor of the verdict is that there was such testimony. We find no express statement that the testimony is all returned, but the bill of exceptions contains statements which are equivalent thereto. The witnesses appear to have been introduced, and the record states that they were "sworn, and testified upon direct examination as follows," and, "upon being cross-examined, testified as follows." And at the close of the plaintiff's evidence the statement is: "And thereupon said plaintiff rested its case." And then follows:

"And the said defendants, to prove and maintain the issue on their part, called William Bloodgood as a witness, who, upon direct examination, testified as follows."

And so the record shows a connected narrative, giving the testimony of each witness, and closing with the statement: "And thereupon the defendants rested their case." When a

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bill of exceptions is so constructed, it will be presumed to contain all the evidence bearing on the questions raised. *Hitchcock v. Burgett*, 38 Mich. 501.

The main question turned upon the controversy whether Harrison & Green had ratified the act of Nickolson in ordering the goods. To show ratification, the plaintiff introduced testimony tending to show that, after the goods had been furnished, plaintiff, through Atkinson, presented the bill thereof to one A. D. McDougal, who represented himself as agent of Harrison & Green. Atkinson testified that he presented three bills to McDougal, who looked them over, and told him to take the Guidio & Warner bill to Nickolson, and have him O K it, and he would pay it the next day; that he did present the bill to Nickolson, and he marked it "O K," and signed his name; that he afterwards saw it in Harrison & Green's office, in Bessemer, O K'd by Nickolson. The bill was afterwards produced in court with the O K of Nickolson upon it. Another bill, called the "tie-bill," McDougal handed to a Mr. Chamberlain, and told him "to see to that." For the small bill of $36.20, which had been ordered by McDougal, he told him he would have a check sent, which he did. It was admitted upon the trial by counsel for defendants that McDougal was agent for Harrison & Green.

Mr. McDougal was also sworn as a witness for defendants, and he testified that in April and May he was superintendent on the South Shore Road for Harrison & Green; that his authority was to represent them in everything connected with the construction of the road. Whenever it was necessary to obtain supplies, he was to get them.

The plaintiff claims that this testimony tends to prove a ratification by Harrison & Green, through their agent McDougal, and by his promise to pay plaintiff has been lulled into security, when it might have commenced its

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attachment suit sooner, as Harrison & Green were non-residents.

In some cases an agent may ratify the unauthorized act of another agent; as—

"Where the act which, when done by one agent, was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second." Mechem, Ag. § 121.

Ratification by an agent depends upon certain facts, which must affirmatively be made to appear:

"1. The agent ratifying must have had general power to do himself the act which he ratifies.

"2. They must both be agents of the same principal, and the agent whose act is in question must have professed to act as agent of the common principal."

A stranger to a party, acting without authority, may do an act in the name of another, which that other may ratify, and so make it his own. But his general agent has no such authority to ratify the act of a stranger done in the name of the principal, unless power of appointing agents has been delegated to him by his principal. He cannot ratify without making the person for that act or occasion the agent of the principal, and this is beyond his general powers as agent.

Nickolson did not represent himself to plaintiff as being an agent for defendants. There is no testimony in the case tending to show that Nickolson at the time he purchased the supplies was the agent of defendants. The act, so far as Harrison & Green are concerned, was the act of a stranger making the purchase without authority from them, and not even in their name. McDougal, therefore, had no authority to ratify or bind Harrison & Green by any promise of payment. Nor could he estop the defendants from denying their liability by promising to pay, if Nickolson would O K the account. We think the case comes within the principles of the following cases: *Wells v. Martin*, 32 Mich. 478; *Danaher*

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v. Garlock, 33 Id. 295; *Frost v. Lawler*, 34 Id. 235; *Hammerslough v. Cheatham*, 84 Mo. 13.

It follows that the judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., and MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JAMES R. LANGDON v. MAY CLAYSON ET AL.

Infants—Mortgage to pay purchase price of real estate—Ratification—Equity.

1. An infant cannot ratify the purchase of land, after arriving at full age, by dealing with the title thus acquired as owner, without ratifying a mortgage given during his minority to secure a loan with which to pay off liens on the land which he had agreed to pay as a part of the purchase price.
2. Courts of equity will always view with special favor, and guard with jealous care, the rights of infants, but will not lend their aid to perpetrate wrongs upon innocent parties, nor aid in depriving them of their just rights.

Appeal from Montcalm. (Smith, J.) Argued April 10, 1889. Decided June 14, 1889.

Bill to foreclose a mortgage claimed to be void on account of infancy of mortgagor at date of its execution, etc. Defendant Palmer appeals. Decree granting relief prayed for affirmed. The facts are stated in the opinion.

Lemuel Clute, for complainant.

Davis & Nichols, for defendant Palmer.

CHAMPLIN, J. Complainant filed his bill January 4, 1887 to foreclose a mortgage.

As originally filed it contained only the usual statements

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of bills of that kind. It alleged that May Clayson and Charles D. Clayson made their two promissory notes payable to complainant, dated March 28, 1882, one for $400 due three years from date, and the other for $500 due six years from date, with interest payable annually at 7 per cent. The mortgage was of even date, and was executed by May Clayson, and covered 40 acres of land in Montcalm county.

Luce and Palmer were made parties as subsequent purchasers or incumbrancers.

Palmer was the only defendant who answered. He set up that May Clayson was an infant under 21 years of age at the time she executed the mortgage, and that it was given to secure the debt of her husband, Charles D. Clayson.

He alleged that he purchased the premises on or about August 30, 1884, from May Clayson, paying therefor a valuable consideration, and obtaining a quitclaim deed, and afterwards, about the twenty-second day of October, 1884, after said May Clayson became of age, and for a valuable consideration, to the said May Clayson in hand paid, she made, executed, and delivered to him a warranty deed, and also revoked all former deeds and mortgages by her made before she became 21 years of age by inserting therein the following:

"It being the intention of the first party to convey to the second party all the title I had to the premises at the time I became twenty-one years of age, and to expressly revoke all former deeds and mortgages made by me before I became twenty-one years of age."

That the mortgage to complainant is void, and constitutes a cloud upon his title, which he asks to have removed, and he prays for relief and the benefit of a cross-bill.

The complainant then amended his bill of complaint, stating therein that May Clayson purchased the land from John Q. Wakely February 11, 1881, and took from him a warranty deed, in which the conveyance to her was made subject to two mortgages,—one for $300, given by James Rich and wife

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to Thomas Fuller, guardian of May Fuller, and the other for $500, given by John Q. Wakely and wife to James Rich,—which mortgages were to be paid by May Clayson as part of the consideration for the land on her purchase from Wakely; and that she obtained the loan of the money from complainant for which said notes and mortgage were given to pay the above-mentioned mortgages, which she assumed when she purchased of Wakely; that such indebtedness was her own, and that Charles D. Clayson merely signed the notes as surety; that she represented herself to be 21 years old, and that complainant would not have loaned the money to her had he supposed that she was an infant.

He further stated that afterwards, and on the twenty-eighth of February, 1883, May Clayson sold and conveyed said land to John Q. Wakely by warranty deed, which contained this clause:

"The above is subject to a certain mortgage given to Langdon March 28, 1882, for $900."

That on September 2, 1884, said John Q. Wakely executed a deed of the land to V. B. Luce, and that, on July 22 and October 22, 1884, said May Clayson executed the deeds above referred to.

The bill charges Luce and Palmer with combining and confederating with May Clayson to cheat complainant; charges on belief that she was of full age when she executed the deed to Wakely, and therein ratified the mortgage; states that May Clayson and Charles D. Clayson have removed to and are residents of Dakota, and are pecuniarily irresponsible; that the facts and circumstances of the transaction entitle him, if she was a minor, to be subrogated to the rights of the mortgagees named in the deed to her from Wakely, and which she procured to be discharged with the money obtained from him.

The bill of complaint was taken as confessed against all of the defendants except Palmer, who answered the amended

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bill, in which he sets up substantially the same defense as in the answer to the original bill, and denies all confederacy and connivance to cheat and defraud complainant; claims that he is the owner in fee; and claims, further, the benefit of a cross-bill, and that his title may be quieted.

Proofs have been taken, from which it appears that May Clayson, whose maiden name was May Fuller, was born May 15, 1862; that she was married to Charles D. Clayson prior to February 11, 1881.

On February 11, 1881, John Q. Wakely conveyed to May Clayson by warranty deed the land in question, in which deed is contained the following:

"Said second party taking said premises subject to two certain mortgages,—one of $300, given by James Rich and wife to Thomas F. Fuller, guardian of May Fuller, minor, etc., the other, $500, given by John Q. Wakely and wife to James Rich, together with accrued interest on the same; the amount of said mortgages being deducted from the purchase price of said premises on this purchase."

The mortgage to Fuller, guardian, bears date June 30, 1879, and is given to secure the payment of $300 on the third day of April, 1883, with interest at 7 per cent., payable annually.

The mortgage to James M. Rich, given by Wakely, bears date the first day of October, 1880, and is given to secure the payment of $500 on the first day of April, 1884, with interest at the rate of 10 per cent., payable semi-annually on the first days of October and April. No question is made as to the validity of these mortgages.

The next conveyance in the order of time is the mortgage to complainant, dated March 28, 1882, executed by May Clayson, to secure the payment of the notes set forth in the bill of complaint. On the same day, *i. e.*, March 28, 1882, Ruth Ropp, the assignee of the mortgage executed by James M. Rich to Thomas F. Fuller, guardian, dated June 30, 1879, executed a full satisfaction and discharge thereof, and also,

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on the same day, James M. Rich executed a full satisfaction and discharge of the mortgage given by Wakely to him on October 1, 1880. The mortgage to complainant and the two discharges above mentioned were each recorded in the register's office on the twenty-ninth of March, 1882, at 6 o'clock P. M.

On the twenty-eighth day of February, 1883, May Clayson executed a statutory warranty deed of the land to John Q. Wakely, which contains this sentence:

"The above is subject to a certain mortgage given to Langdon March 28, 1882, for nine hundred dollars."

This deed was placed on record February 12, 1884.

On the twenty-second day of July, 1884, May Clayson executed a quitclaim deed of the premises to Don E. Palmer. This was acknowledged before a notary public in Montcalm county, and was placed on record the thirtieth day of August, 1884.

On the second day of September, 1884, John Q. Wakely and his wife executed a quitclaim deed to V. B. Luce, which was placed on record September 3, 1884.

The next deed is dated October 22, 1884. It is a warranty deed from May Clayson to Don E. Palmer, and contains the clause following:

"This deed is executed and delivered by the first party for the purpose of supplementing and adding to a quitclaim deed, previously given by the first party to second party herein, and conveying the above premises, and adding thereto covenants of title; it being the intention of first party to convey to second party all the title I had to the premises at the time I became twenty-one years of age, and to expressly revoke all former deeds and mortgages made by me before I became twenty-one years of age."

This deed was not acknowledged until the fourth day of November, 1884, before a notary public of Brown county, territory of Dakota, and was placed on record on the fourteenth of November, 1884.

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The only proof introduced on the part of the defendant was his title deeds from May Clayson, and testimony tending to prove her age, and that about $30 of the $900 loaned was used in paying either a store account or a note of Charles D. Clayson.

The second deed executed by May Clayson to defendant Palmer conveyed no title or interest in the land whatever, and there was nothing to which the covenants of warranty could attach. As independent covenants for title they were worthless, for the reason that the defendant was a married woman, and covenants had no connection with any separate property owned by her.

The complainant showed that the loan was obtained by May Clayson to take up and discharge the two mortgages that were void liens upon her property, and that it was used for that purpose, with the exception of a few dollars. The arrangement made was beneficial to May Clayson. The time for payment was extended, and the interest on $500 reduced from 10 to 7 per cent. The money was loaned by the complainant in good faith, and upon the supposition that May Clayson was of full age. Mr. Rogers, the agent of complainant, who made the loan, testifies that to appearance May Clayson was at that time 25 years old, and he got the impression from what was said and done that she was then of full age.

When the defendant obtained his quitclaim deed from May Clayson he had record notice of complainant's mortgage, and that it appeared to be the first lien upon the land. He had record notice that the legal title had been conveyed from May Clayson to Wakely by warranty deed expressly made subject to complainant's mortgage. More than a year had elapsed since May Clayson had attained her majority, and by no word or act had she repudiated or revoked the mortgage to complainant, or her deed to Wakely.

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Defendant Palmer is not sworn as a witness, and there is nothing in this record which shows that he ever paid a dollar consideration for the land in question. He places himself upon a purely legal defense, and shows himself entitled to no equities whatever. The claim set up in the defense that this $900 was obtained, and the security given, to pay the debts of the husband of May Clayson, has failed substantially, and I think entirely. It is true that May Clayson in her disposition taken in Dakota says:

"The mortgage was given to secure my husband's indebtedness. Part of the money obtained on that mortgage went to pay off a first mortgage, and the balance went to pay other indebtedness of my husband."

But the proof is satisfactory that she is mistaken; that the money was not obtained to pay her husband's indebtedness, but to pay off incumbrances on her property; that she represented that to be the purpose when she obtained the loan, and that all but a very small fraction was then and there applied to that purpose.

More unsatisfactory is the testimony of E. Barrett and Mr. Rockafellow. Barrett is asked if he knows anything about what was done with the money that was borrowed of Mr. Rogers, the witness spoken of, and he replies:

"Well, I think it went to Mr. Rockafellow,—what they owed him. I suppose it was a family debt. I don't know whether her contract or his contracts,—store bill. He kept a store there at that time."

Mr. Rockafellow is asked if he recollected the transaction of giving the mortgage to Langdon, and if he knows anything about what was done with the balance of this money spoken of. He testified that part of it was paid to him,—that he did not remember the amount,—for a note he held against Charles Clayson. He could not say positively. He had quite a good deal to do with Clayson, and he thought the note was for a horse, and thought it was somewhere in the

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neighborhood of $25 to $30. He knows where he got the money, because he (Rockafellow) tried to make a loan for them to another party before that one. They wanted to get the money partly to pay off the mortgages and partly to pay him. They owed him a store account besides the note.

Rogers testified that they computed the amount due upon the mortgage indebtedness, and it came to nearly $900, and they said they would take $900. There was a small balance over, probably one or two dollars. Whatever it was, was paid to May Clayson, and he does not know what was done with it. I do not think that this small balance, whether $1 or $30, that was paid to Mrs. Clayson after paying the mortgages, has anything to do with the validity of the mortgage in question.

It is evident that the object and purpose of making the loan of Mr. Langdon was to pay off and discharge the existing incumbrances upon May Clayson's land, and to substitute the lien of the Langdon mortgage for those, and obtain a longer time for payment at a lower rate of interest. Upon what principle of equity or justice can the validity of this mortgage be attacked and set aside as invalid? The infant was by her own oath then nearly 20 years of age. She looked to be 25. More than a year previously she had purchased this land, and taken the title in her own name, subject to the incumbrances, which she assumed and agreed to pay as part of the purchase price. She has never repudiated this transaction, but has ratified and affirmed it after her majority by dealing with the title she thus acquired as owner. She could not ratify the purchase without ratifying the agreement to pay the existing liens as part of the purchase money, nor without ratifying the manner in which she dealt with those liens. She voluntarily sought complainant, and borrowed the money from him to pay off these incumbrances by placing another upon the premises. By this she only shifted her obligation to pay Ropp and Rich to pay the same

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purchase price to complainant. She is not harmed by this transaction, but is benefited.

While there is no absolute time in which an infant must act after he has arrived at the age of 21 to prevent the presumption of ratification arising from lapse of time, and while courts will not be curious to inquire whether the act was beneficial or not, or over-nice or stringent in applying the rule that he must act in a reasonable time when it is proper to protect his rights, yet when he has a right to repudiate a transaction in which he has not been defrauded or overreached, and where he has received and retained the benefit of the transaction, he must act with reasonable promptness, or he will be deemed to have ratified the act by acquiescence.

Under the facts of this case, independently of other considerations under which this mortgage must be treated and held as a valid security, a right-minded person never would have attempted to repudiate the mortgage executed for the purpose and under the circumstances of this case, and, after the lapse of more than one year after she reached her majority, she will, in aid of justice and equity, and to prevent fraud, be deemed to have intended to ratify the transaction by her silence and acquiescence.

It would be a reproach upon the administration of justice if a scheme so inequitable and unconscionable as this appears to be from the record should succeed. Courts of equity will always view with special favor, and guard with jealous care, the rights of infants, but they will not lend their aid to infants, or those who entrench themselves behind them, to perpetrate wrong upon innocent parties, or aid in depriving such parties of their just rights.

The decree of the circuit court is honest, and should be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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GEORGE E. BROMLEY v. CLARISSA GOFF.

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Pleading—Declaration—Executory consideration—Mutual promises—Damages—Common counts.

1. Where the consideration of a contract is executory, the plaintiff is required to state it in his declaration with a greater degree of certainty and minuteness than in the case of an executed one, to enable the court to judge whether the performance alleged is sufficient; and in the case of mutual promises made upon the strength of concurrent considerations, such promises must be alleged to have been concurrent or obligatory upon both parties at the same time.
2. Damages for the non-performance of an unrescinded contract, not conditioned for the payment of money,—the undertakings of plaintiff not being fully performed, and his damages arising from his not being permitted to perform them,—cannot be recovered upon the common counts by averring performance.

Error to Wayne. (Brevoort, J.) Argued April 10, 1889. Decided June 14, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. W. Donovan, for appellant.

Charles Kudner, for defendant.

CHAMPLIN, J. The declaration in this case was in assumpsit, and alleged that in the fall of the year 1887 the parties entered into a written lease and contract, in which the defendant agreed to and with the plaintiff to let and lease to him the restaurant premises in the second story of the northwest corner of Jefferson avenue and Randolph street, Detroit, for and during the time from the date of the lease to May 1, 1889, for the refitting and repairs to be made, and which were immediately made, by plaintiff on said premises, and

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certain lunches to be furnished by plaintiff, and he duly furnished the same, at a cost of $500, and for which labor, materials, and repairs by said plaintiff so furnished he was to have and enjoy the said premises for the time aforesaid, free of rents.

The plaintiff averred that in full reliance upon said promises he proceeded to and did fit up said premises immediately, and began to build up a trade in the restaurant business, and expended large sums of money in the repairs of walls, papering, mending wood-work, repairs of locks and keys, plumbing, carpenter work, painting, buying stoves, dishes, and fixtures, and generally prepared to do a large restaurant business in said premises; and that about January 1, 1888, and after the defendant had long neglected to pay her rent to the owner of said restaurant building, both defendant and plaintiff were forcibly put out and ejected from said premises, without any fault of plaintiff whatever.

Plaintiff further avers that by reason of said breach of contract and failure to perform her contract defendant has caused plaintiff to lose his restaurant trade and custom, and to be forcibly turned out from his premises leased of defendant, and to lose the cost of repairs and expenses of advertising and fitting up and furnishing same, together with a large outlay made and expended by plaintiff in reliance upon said lease and contract of possession with defendant, without any fault or default of his own, but wholly by and through the default of defendant in failing to keep and perform her said contract with plaintiff, including the contract incidental thereto,—her rent paid up, to enable her to hold for plaintiff the premises aforesaid,—to his damage in all of $1,000.

The common counts in assumpsit were added, under which a bill of particulars was filed for loss on purchase of dishes for restaurant, oil-cloth, napkins, spoons, etc., including time in cleaning up, loss of business, and of plaintiff's own time. The plea was the general issue.

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On the trial the plaintiff offered in evidence, after proving its execution, the following paper writing, viz.:

"It is hereby agreed between Clarissa A. Goff, of Detroit, Wayne county, Michigan, party of the first part, and George E. Bromley, of the same place, party of the second part, as follows:

"The said party of the first part, in consideration of the covenants herein specified, does hereby let and lease to the said party of the second part the rooms up-stairs on the corner of Jefferson avenue and Randolph street, excepting the three back rooms over No. 81 Randolph street, in the city of Detroit, Wayne county, Michigan, together with the furniture now contained in said premises, from the date hereof until the first day of May, 1889, on the terms and conditions hereinafter mentioned, to be used and occupied for a restaurant and eating-rooms.

"And the said party of the second part does hereby hire the said premises for the term above specified, and does covenant and agree to put said premises in good repair, and fit up the same so as to render it fit for said business, and run the same in a quiet and orderly manner; that he will not keep or sell cigars or liquors on his own account, but agrees to purchase all cigars, liquors, and drinks used on said premises, or in the club-room hereinafter mentioned, from said first party, and pay her therefor the regular retail price; and also that he will cook lunches for the bar-room, when required by said first party, free of charge.

"It is further agreed that said parties hereto are to jointly fit up two back rooms over 81 Randolph street for a club-room, each to pay one-half the expense, and the said party of the second part is to take care of and attend to said rooms, and keep the same in order, and the proceeds of the games therein are to be divided equally between said parties.

"And said party of the second part further agrees that he will not assign nor transfer this lease, or sublet said premises or any part thereof, without the written assent of said party of the first part. And also that he will at his own expense, during the continuance of this lease, keep said premises and every part thereof in as good repair, and at the expiration of the term yield and deliver up the same in like condition, as when taken, reasonable use and wear thereof and damage by the elements excepted.

"And the said party of the first part does covenant that the said party of the second part, on performing the cov-

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enants aforesaid, shall and may peacefully and quietly have, hold, and enjoy the said premises for the term aforesaid.

"The covenants, conditions, and agreements made and entered into by the several parties hereto are declared binding on their respective heirs, representatives, and assigns.

"Witness our hands and seals this nineteenth day of October, 1887. C. A. GOFF. [Seal.]
"GEO. E. BROMLEY. [Seal.]

"It it hereby understood and agreed that in case said first party procures a new lease of said premises, or an extension of the present one, said second party is to have the same rights therein as above specified, until the expiration thereof.
"C. A. GOFF. [Seal.]
"GEO. E. BROMLEY. [Seal.]"

Counsel for defendant objected to the admission of the instrument in evidence as incompetent, as there was a material variance in the instrument offered and the declaration in this: That it does not set forth the entire consideration in the lease between the parties. The court sustained the objection, and excluded the testimony.

The plaintiff's attorney then offered testimony to prove that the plaintiff, at the request of defendant, proceeded to pay out money in fitting up a restaurant, and was at large expense and outly at her request. The counsel for the defendant objected, because it all depended upon a written agreement, and the court excluded it because it was set forth in the written contract, and on request of defendant's counsel directed a verdict for defendant.

The errors assigned are upon the rulings of the court.

The consideration for the defendant's covenant for quiet enjoyment during the term for which the premises were demised to the plaintiff consisted of several particulars, viz.:

1. That plaintiff was to put the premises demised in good repair, and fit up the same so as to render them fit for the business of a restaurant and eating-rooms.

2. That the plaintiff would not keep or sell cigars or liquors on his own account, but he agreed to buy and pay for such as were used upon the premises from the defendant.

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3. That he would cook lunches for the bar-room, when required free of charge.

4. That he would jointly with defendant fit up and furnish two back rooms over 81 Randolph street, and pay one-half of the expense, and take care of and attend to and keep the same in order.

There may be some question as to whether the fourth subdivision entered into the consideration for the renting, but it cannot be said to be entirely severable from the leasing, as it is plain that without the restaurant and eating-house the club-room would be of no value. It was an adjunct to the premises demised, and the agreements concerning it were entered into in connection with the lease. It is seen, therefore, that the consideration for defendant's promise set out in the instrument offered in evidence is a continuing one.

On the other hand, the letting of the premises described is not the only consideration moving to the plaintiff for occupying the premises, and expending his labor and means in fitting them up. The defendant undertook to sell plaintiff liquors and cigars to be used in his restaurant, and in the club-room at the regular retail price, and also join in fitting up and furnishing the club-room, and to pay one-half of the expense. It thus appears that the promises were mutual, and the consideration concurrent and continuing.

Where the consideration is executory, the duty is imposed upon the plaintiff, in pleading, to state the consideration with a greater degree of certainty and minuteness than in the case of executed considerations, in order to enable the court to judge whether the performance alleged in the declaration was sufficient. And in the case of mutual promises upon the strength of concurrent considerations, it must be stated in the pleading that the promises were concurrent or obligatory on both at the same time. 1 Chit. Pl. (16th Amer. ed.) 387, 388, *303, *304.

The variance between the instrument declared on and the

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one offered in evidence was material, and was rightly excluded.

The plaintiff was allowed to and did amend his declaration by inserting the clause in reference to furnishing lunches, but declined to amend further. The amendment did not cover nor cure the variance pointed out.

The plaintiff's counsel contends that he was entitled to introduce his testimony under the common counts. His bill of particulars restricts his claim under the common counts to loss on purchase of dishes and other articles, on plumbing, carpenter work, painting, papering, advertising, cleaning up, on loss of business, of plaintiff's own time, etc.

Loss of time, loss on dishes purchased for one's self, loss on business, and loss on the other items named, are not provable under the common counts in assumpsit.

Neither could a recovery be had under the common counts based upon the contract offered in evidence by averring performance. The agreement broken is not to pay money, nor is the contract rescinded. The undertakings on the part of the plaintiff were not fully performed, and the damages suffered were those which arose from not being permitted to perform them. *Beecher v. Pettee*, 40 Mich. 181; *Pierson v. Spaulding*, 61 Id. 90, 94 (27 N. W. Rep. 865); *Butterfield v. Seligman*, 17 Id. 95.

The counsel for plaintiff cites and relies upon the following authorities as supporting his position that the plaintiff was entitled to recover under the common counts in assumpsit, viz.: *Blackwood v. Brown*, 34 Mich. 4; *Aldrich v. Chubb*, 35 Id. 350; *Mitchell v. Scott*, 41 Id. 103 (1 N. W. Rep. 968); *McQueen v. Gamble*, 33 Id. 343.

In the last case cited the plaintiff had performed labor for defendant, and brought an action to recover therefor upon the common counts in assumpsit. The defendant set up a contract which he had expressly repudiated, and employed another person in plaintiff's place. The Court held that the

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defendant was not at liberty to claim the benefit of a contract he refused to regard, and expressly repudiated, in order to turn the plaintiff out of court.

Mitchell v. Scott was a case where the contract was rendered incapable of performance by defendant's act, and the plaintiff rescinded and rejected it, and the plaintiff was held entitled to recover the wages earned by the vessel and crew, but not as damages for the breach of contract.

Aldrich v. Chubb does not touch this question.

Blackwood v. Brown was an action brought to recover money collected by defendant upon certain securities deposited with him as indemnity for becoming a surety, and which he refused to pay over after his liability as surety had ceased. None of these cases have any analogy to the present.

The judgment must be affirmed.

The other Justices concurred.

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BENJAMIN S. ESTLOW v. WILLIAM E. HANNA.

Attachment—Debt fraudulently contracted—Joinder of claims—Dissolution of writ.

A writ of attachment issued on the ground that the debt sued for was fraudulently contracted will be dissolved if it appears that a portion of said claim is not affected by such fraud.

Certiorari to judge of Branch circuit to review an order refusing to dissolve an attachment. Argued April 16, 1889. Judgment reversed June 14, 1889, and writ dissolved. The facts are stated in the opinion.

H. H. Barlow, for petitioner.

Ware & Palmer, for respondent.

LONG, J. *Certiorari* from this Court to review the proceed-

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ings of the circuit court of Branch county in refusing to dissolve a writ of attachment.

The writ was issued upon an affidavit charging that the debt was fraudulently contracted respecting which the suit was brought.

The suit was brought upon three promissory notes. These notes were given by the defendant to three different parties, and signed by the plaintiff as surety. When they came due plaintiff paid and took them up, and on February 1, 1888, brought this suit by attachment upon them. The affidavit for the writ and the writ were regular in form, and the writ was levied by the sheriff of that county upon certain real estate of the defendant, and a copy of the writ served.

On April 27, 1888, the defendant filed a petition for the dissolution of the writ. Citation was issued, returnable May 3, 1888, and on that day the parties appeared, and, after witnesses were sworn, the court made the following finding of facts and conclusions of law:

"1. That the cause alleged in the affidavit for issuing the writ of attachment is that the debt for the recovery of which the suit is brought was fraudulently contracted.

"2. The action was brought to recover the amount due upon three different promissory notes hereinafter mentioned, which were signed by the plaintiff as surety for the defendant, and which as surety he afterwards assumed and paid. The plaintiff claims that he was induced to sign such notes by reason of false and fraudulent representations made to him by defendant in reference to his financial condition.

"3. As to the first of said notes, known as the 'Cooley note,' dated April 20, 1876, upon which there is unpaid at the date hereof the sum of $352.39, I find that there was no fraud or misrepresentation, and that the obligation of the plaintiff as surety thereto was not induced by fraud.

"4. In reference to the second note, known as the 'Bidwell note,' dated February 19, 1878, upon which there is unpaid at the date hereof the sum of $387.49, I find that the plaintiff was induced to sign the same as surety by reason of false and fraudulent representations made to him by the defendant in reference to his financial condition before and at the time of signing the note.

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"5. As to the third note, known as the 'Ford note,' dated April 22, 1878, upon which there is due at the date hereof the sum of $327.78, I find that there were no further representations made by the defendant to the plaintiff as to his financial condition after signing the Bidwell note, and there was no evidence upon the subject whether in signing the Ford note he relied upon the representations made when he signed the Bidwell note."

The conclusions of law were as follows:

"1. That the obligation as surety to the Cooley note was not fraudulently contracted.

"2. That the obligation of the plaintiff as surety to the Bidwell note was fraudulently contracted.

"3. That the indebtedness growing out of the Ford note was not fraudulently contracted.

"4. That the motion to dissolve the attachment be and is denied, with costs to the plaintiff.

"And, further, I have filed an order in said cause denying the motion to dissolve such attachment, with costs to the plaintiff."

The sole contention is that under this finding of facts the court should have dissolved the writ, as it appears that the whole of the indebtedness sued upon was not fraudulently contracted.

How. Stat. §§ 7986, 7987, authorizing writs of attachment, provide:

"Any creditor shall be entitled to proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor * * * shall reside, * * * in the cases, upon the conditions, and in the manner provided in this chapter."

"Before any such writ of attachment shall be executed, the plaintiff, or some person in his behalf, shall make and annex thereto an affidavit stating that the defendant therein is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be over and above all legal setoffs, and that the same is due upon contract, express or implied, or upon judgment; and containing a further statement that the deponent knows, or has good reason to believe," etc.

Then follow the various statements that the defendant has

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absconded; has assigned, disposed of, or concealed his property; that he is about to remove his property out of this State, with intent to defraud his creditors; and the fourth subdivision, being the one under which the affidavit in the present case is framed,—

"That he has fraudulently contracted the debt or incurred the obligation respecting which the suit is brought."

The affidavit is in compliance with these provisions of the statute. The affidavit is necessary to confer jurisdiction, and the amount of the debt must be stated as near as may be over all legal set-offs, and the amount must be shown to be due upon express or implied contract.

The circuit court is a court of general common-law jurisdiction in both civil and criminal cases. Its general powers are clearly defined. The proceedings in attachment do not fall within the general powers conferred, but are special and extraordinary, and in derogation of the common-law, and must be strictly pursued. They do not derive their efficacy from the general powers of the court. The court can act only under the special limited powers granted by the statute, and according to its forms of procedure. *Buckley v. Lowry*, 2 Mich. 420; *Greenvault v. Farmers' & Mechanics' Bank*, 2 Doug. 507.

The writ is issued upon an *ex parte* affidavit, and at once creates a lien upon the property, and, though actual personal service may not be had upon the defendant, by proper procedure the property may be subjected to sale on execution issued upon a judgment rendered in the proceedings.

In the present case it appears that the levy was made under the writ upon the lands of the defendant, creating a lien thereon to the amount of $1,067.66, though it appears that only $387.49 of that amount was fraudulently contracted. If plaintiff's counsel are correct in their contention, then, if the amount due and owing was four times that sum, and $100 of the amount (sufficient to bring it within the juris-

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diction of the circuit court) was fraudulently contracted, a lien could be created for the full amount of the claim, and defendant could not relieve his property of the lien.

Plaintiff's counsel contend that this may be so, for the reason that the right to commence his suit by attachment is not based upon the idea of his being able to take and hold the defendant's property before judgment, but is founded upon the *animus* of the defendant; that the statute, in effect, says, if you practice fraud upon the plaintiff in your dealings with him, he shall have the right to commence suit against you at any time by attachment to recover such sum as you may owe him.

The language of this fourth subdivision, however, is—

"That he has fraudulently contracted the debt or incurred the obligation respecting which the suit is brought."

Here the suit was brought to recover the money paid by plaintiff for defendant upon three certain promissory notes. The debt as to two of them was not fraudulently contracted, yet the lien created upon the property of the defendant included the amount of these two notes, as well as the amount so fraudulently contracted. The amount of these two notes the plaintiff had no right to have included in his lien. It was no part of the debt fraudulently contracted, and, within the meaning of this statute, he had no right to have his writ for those amounts, or to have a lien upon the property of the defendant therefor.

If this writ had been levied upon personal property, the defendant, or any person in whose possession the same was found, would have had the right to give a bond to the officer to satisfy the judgment, and retain possession. This bond the officer may demand to be in double the amount specified in the affidavit before releasing the property, and under plaintiff's contention, though but $100 of the amount was fraudulently contracted, yet the defendant, before he could

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get his property released, would be compelled to give a bond for the entire amount of the debt sworn to be due.

Again, one having a claim covered by this subdivision of the statute might, under the construction contended for, attach thereto any number of assigned claims, and obtain a lien upon the property of the debtor for the whole sum.

We cannot agree with any such harsh construction of this statute. The remedy itself is a harsh and extraordinary one, proper when it comes within the plain provisions of the statute, but the statute should not be extended by construction. We are cited to no case by counsel which upholds the doctrine for which they contend, and we are satisfied upon principle none can be found. On the contrary, wherever this question has come before the courts of other states, it has uniformly been held that attachments will not be upheld where the complaint or affidavit sets forth several causes of action, some of which are without the statute. *Union Consolidated Mining Co. v. Raht*, 9 Hun, 208; *Wilson v. Harvey*, 52 How. Pr. 126.

In *Mayer v. Zingre*, 18 Neb. 458 (25 N. W. Rep. 727), it was held that a cause of action in a petition upon a debt not fraudulently contracted, if coupled with a cause of action upon a debt which was fraudulently contracted, and an order of attachment covering both counts is issued upon an affidavit alleging that said defendant fraudulently contracted the debt and incurred the obligation for which this suit is brought, vitiates such an order, and justifies its discharge.

The court below was in error in its conclusions of law under the facts found.

The judgment of the court below must be set aside, with costs, and the writ of attachment dissolved.

The other Justices concurred.

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ALBERT DIXON v. COMMISSIONER OF HIGHWAYS OF THE TOWNSHIP of PORT HURON.

Highways—Notice of proceedings to establish—Jurisdiction of commissioner.

Ten *full* days' notice of a meeting of the commissioner to determine the necessity of laying out a highway must be served upon the owners or occupants of the land through or adjoining which it is proposed to lay out said road. *Platt v. Highway Commissioner*, 88 Mich. 247.[1]

Certiorari to the highway commissioner of the township of Port Huron to review his proceedings in laying out a highway. Submitted on briefs April 17, 1889. Proceedings quashed June 14, 1889. The facts are stated in the opinion.

Stevens & Merriam, for petitioner.

LONG, J. *Certiorari* to the highway commissioner of the township of Port Huron.

The petitioner is the owner of a piece of land situated in said township, through which, under proceedings had before the commissioner, it is proposed to locate and establish a highway; said land being occupied, as it is claimed, by petitioner's tenant.

The petition was presented to the commissioner for the establishment of this highway, signed by the requisite number of freeholders of the township, on September 18, 1888, and on the nineteenth he served a notice, as is claimed, on only a part of the residents whose land was affected by the opening of such highway, and also posted notices at the several points in the township required by the statute.

[1] See *Soller v. Township Board of Brown*, 67 Mich. 422 (head-note 1, and note).

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The notice stated that the proceedings would be heard on the twentieth of September, at 2 o'clock in the afternoon. On that day, as appears from the return, the commissioner, on his own motion, adjourned the hearing until October 13, 1888, without stating any definite time or particular place; and on October 13 he claims to have gone on and established the highway.

At the time of the institution of the proceedings the petitioner was a resident of Port Huron, and the premises owned by him, and through which said road was to be established, were occupied by his tenant, and had been for a number of years.

The commissioner, in his return, states that he served this notice upon certain persons, owners of the lands through which said highway was to be established, and certain of these parties appeared before him on September 20, among whom was Herman W. Stevens, and that, while said Stevens stated he did not appear for any one, he verily believed that said Stevens appeared for Albert Dixon, the petitioner herein. It is not claimed that any notice was ever served upon Dixon, or on his tenant in possession of the premises.

The questions raised are:

"1. That the notice of hearing either served or posted on September 19, 1888, for a hearing to take place on the twentieth of that month, was too short to give the commissioner jurisdiction.

"2. That, had he acquired jurisdiction upon a proper notice, he lost the right to proceed further by adjourning the hearing without specifying the hour and place of such adjournment.

"3. That the law requires when the premises are occupied that the notice of hearing shall be served upon the occupant, and the failure of the commissioner to make such service is fatal to the proceedings."

These points are well taken, and the proceeding is fatally defective.

How. Stat. § 1298, provides that when the petition for the

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laying out of a highway shall be presented, signed by the requisite number of freeholders, the commissioner shall, within five days thereafter, issue a written notice, etc., which notice shall be served, etc., on the owners or occupants of the land through or adjoining which it is proposed to lay the same out, at least 10 days before the day of hearing. Here no notice was served at all upon the occupants of these premises, and in the notice actually served upon the other parties the time fixed for the hearing was only one day from date of service, and only one day from date of notice. This was a fatal defect. *Platt v. Highway Commissioner*, 38 Mich. 247; *Sallee v. Ireland*, 9 Id. 157.

We need not discuss the other questions raised.

The commissioner was without jurisdiction, and the whole proceeding must be reversed and quashed, with costs.

The other Justices concurred.

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CATHARINE AMPERSE v. THE CITY OF KALAMAZOO.

[See *post*, 534.]

Municipal corporations—Neglect of council to approve liquor bonds —Liability of city.

A city is not liable for the willful refusal of its common council to approve of a liquor bond pursuant to the statute of this State.

Error to Kalamazoo. (Mills, J.) Argued April 18, 1889. Decided June 14, 1889.

Case for refusal to approve a liquor bond. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

O. T. Tuthill, for appellant.

E. S. Roos (*William G. Howard*, of counsel), for defendant.

LONG, J. This cause came on to be heard in the circuit court for the county of Kalamazoo without a jury, and the court, having heard the offer of proof made by the plaintiff, directed judgment to be entered in favor of defendant.

Plaintiff brings the case here by writ of error.

The plaintiff offered proofs tending to show that the plaintiff, the wife of Marenus Amperse, resided at the city of Kalamazoo, and was desirous of engaging in the business of the sale of spirituous and malt liquors at retail in the grocery store occupied by her husband in said city.

That she is of the age of 40 years and upwards; and on or about May 20, 1885, she presented a bond in conformity with the requirements of the statute, with two sufficient sureties, in the sum of $3,000,—that being the sum fixed as the penalty of such bonds by the common council of said city.

That the bond took its regular reference to the committee

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on license, and at the regular meeting of the council, on the twenty-fifth of that month, the committee reported thereon as being a good bond financially, but made no recommendation upon it; that at that time the mayor of said city stated that there were certain petitions on file against granting a license to the plaintiff and her husband to carry on the business of retailing spirituous and malt liquors.

That by request of one of the members of the council the city attorney was asked to state his opinion as to the matter of the petitions, and the right of the plaintiff to have granted to her a license and the approval of the bond, at which the city attorney stated to the council that the statute made no distinction between individuals; that any person who could present the requisite bond was entitled under the law to have his bond approved by the council, and licensed thereby to engage in the sale of liquors; and that the council acting fairly under the law and upon the report of the committee that the bond was found to be good in all respects, and there being no objection to the sureties, their financial responsibility and efficiency, they were bound to approve it.

That, on being interrogated by a member of the council what would be the consequences if they did not, he answered that it was at the risk of a possible legal remedy to the petitioner, or any applicant, by an action on the case against the members of the council individually for a willful refusal to perform their duty in approving said bond reported upon by the committee to be good and without any objection.

That thereupon George Winslow, a member of the council, made the following motion:

"Alderman Winslow moved that the bond of the petitioner be disallowed; that, if the instructions of the city attorney was law, he wanted to be put on record as going against the law, and taking the chances in disapproving said bond; that the petitions on file against granting your petitioner a license and approving her bond, for the reasons stated, were enough for him, and that the council ought to be governed thereby;

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that the petitions ought to be respected, and control the action of the council in this case.

"The motion then having been made by Alderman Winslow, and seconded, being put to a vote, the council voted that the bond be disapproved."

That the petitions referred to against the approval of the bond state that plaintiff and her husband kept a disorderly house in the past year, and that the sale of liquor in that neighborhood is dangerous to real estate; and the council, when acting in disapproving said bond, stated in its session that the reasons set forth in such petitions were its reasons for disapproving the bond, and made no pretense of any other reason or cause.

That at a meeting of the council held on June 1 thereafter the plaintiff, by her attorney, appeared before it, and asked the council to give its reasons for disproving the bond, and, if there was any other objection than the matter of such petitions, to state the same, so there would be no mistake as to the cause of rejecting of said bond, and again asked the council to approve the same, and again presenting the said bond to the council; whereupon the council refused to approve the same, or make any further objection thereto.

Counsel for plaintiff further offered to show that the matter set forth in the petitions, that plaintiff and husband kept a disorderly place, was what governed the council in disapproving the bond, and that it was not on account of any defect in the bond, or the insufficiency of the sureties thereon; and that the plaintiff was ready, upon the approval of the bond, to pay the tax required by the statute to the city treasurer to enable her to carry on the business.

That upon such refusal of the council to approve the bond a petition was made by the plaintiff to the Supreme Court for a *mandamus*, and on June 8 an order was made by said Court to the common council to show cause why the writ should not issue, which was served on the mayor of the city

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on June 9; that thereafter no action was taken by the council until August 19, when the committee again reported without recommendation, and the bond was again disapproved; that at the October term of the Supreme Court the cause on the petition for *mandamus* was argued, and in the January term, 1886, of that Court a decision was rendered granting a peremptory *mandamus* upon the council for the approval of the bond,[1] and on January 20, 1886, the bond which had been presented by the plaintiff on May 20, 1885, was approved by the action of the council, and the tax was paid a few days thereafter to the city treasurer.

That from the twentieth day of May, 1885, when the bond was presented for approval and the license asked, a period of nine months and over, the plaintiff was deprived from carrying on any business, and the tax which was paid from that time, amounting to about $150, was lost; that during that time the plaintiff would have in the business received from the sale of spirituous liquors, for whisky, in profits, $80 a barrel, the sum of $960, about 250 kegs of beer, at $2.50 a keg profit, and other spirituous liquors, such as brandy, wine, and gin, a profit of about $80, and the costs of the proceedings had in the course of the *mandamus*, which would have been in the sum of about $2,000.

Upon this offer of proof being made, the court asked plaintiff's counsel if he claimed that the records of the council show that the bond was disapproved because the plaintiff kept a disorderly house. To this inquiry counsel stated:

"The records show nothing to show that it was disapproved for that reason. I offer this return made by the city attorney to the city council, for the purpose of showing their reasons for refusing it."

The court then asked counsel:

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[1] See *Amperse v. City of Kalamazoo*, 59 Mich. 78.

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"You claim that outside of the records you are entitled to show what was said?"

To which counsel responded:

"I claim we have the right to show all that was said and all that was done by the council in the disapproval of this bond; the reasons they gave for it."

From an inspection of the return made by the council to the order to show cause, which plaintiff's counsel put in evidence, it appears that when the bond was presented to the council it was referred to the committee on license, by whom it was referred back to the council without recommendation; the committee stating in referring it back that they had no recommendation to make. This report was adopted, and Mr. Ihling, a member of the council, offered the following resolution, which was unanimously adopted:

"Moved that the liquor bond of Catharine Amperse be disapproved."

And in this return the council say that this embraces its entire action in regard to the liquor bond of the plaintiff. The proofs tendered by plaintiff's counsel of the action of the common council or any of its members, aside from this action as stated in such return, were not, therefore, matters of record; but counsel claimed the right to supplement the record by parol proofs showing just what was said and done by the council and its several members at its meetings, as well as the advice given there by the city attorney.

The foregoing is substantially all that was claimed by counsel for plaintiff, as making a cause of action, and upon which he claimed a right of recovery against the city.

Even if such parol proofs were competent to supplement the record of the council it would not constitute a cause of action against the city. A municipal corporation cannot be made liable in any such action. Municipal officers are in no such sense municipal agents that their negligence is the negligence of the municipality. The city cannot be made to

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respond in damages for the torts of its officers, even if such wrongs could be redressed against the officers themselves.

It is true, if the act which is done by a municipal corporation would be tortious if done by a natural person, the corporation is held liable for it to the same extent and for the same reason, but no such body can be made responsible for official neglect involving no active misfeasance. It is only where corporations have been guilty of some positive mischief produced by active misconduct that they have been held liable, unless there be a valid contract creating or a statute declaring the liability. Here the complaint is of a wrong done the plaintiff, not by an act of the council, but by its refusal to act,—its refusal to approve the bond. No active misfeasance is charged, but a willful neglect of duty.

It cannot matter, so far as the liability of the city is concerned, whether the neglect was willful or otherwise. There is no common-law liability, and there is no statute in this State which creates any.

Judge Dillon, in his work on Municipal Corporations § 754, lays down the rule that a municipal corporation is not responsible for an omission or refusal to enact ordinances or by-laws, in the absence of a valid contract creating or a statute declaring a liability therefor, nor if it enacts them is it liable for damages arising from a neglect to enforce them. In *City of Detroit v. Blackeby*, 21 Mich. 113, it was said by this Court:

"It has been uniformly held * * * that public officers, whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it, unless it is authorized or ratified expressly or by implication."

This same principle was recognized in *McCutcheon v. Homer*, 43 Mich. 483 (5 N. W. Rep. 668).

This rule is sustained by the decisions of the courts of the several states wherever the question has arisen.

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The court was correct, under the circumstances, in directing judgment for defendant.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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CATHARINE AMPERSE v. GEORGE C. WINSLOW.

[See *ante*, 228.]

Liquor traffic—Failure of council to approve bond—Action against individual member—Judicial discretion—Duty of council—Willful misconduct—Damages.

1. The officers charged by statute with the approval or disapproval of liquor bonds act judicially within the scope and limit of the authority thus conferred, and cannot be made liable in a civil act on for their refusal to approve such a bond, no matter how erroneous their determination may be.
2. A member of a city council is not precluded by the favorable report of the committee, to whom a liquor bond is referred; from investigating for himself, and, if the bond is put upon its passage upon such report, has not only the right, but it is his duty, to vote against its approval, if not satisfied that it meets the statutory requirements.
3. It is the duty of officers charged with the approval or disapproval of liquor bonds to see that said bonds, and the affidavits of the sureties therein, meet all of the statutory requirements applicable to such bonds and affidavits, and that the penalty is that fixed by the body of which such officers are members, and if, in their judgment, *each* surety is not worth said sum over and above the statutory deductions, it is their duty to disapprove the bond.
4. The willful violation of a plain duty by an officer acting in a *ministerial* capacity will not subject him to a suit for damages if the party affected thereby has sustained no injury by such misconduct.

Error to Kalamazoo. (Buck, J.) Argued April 18, 1889. Decided June 14, 1889.

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Case for refusal to approve of a liquor bond. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

O. T. Tuthill, for appellant.

E. S. Roos (*William G. Howard*, of counsel), for defendant.

LONG, J. The defendant interposed a demurrer to the declaration filed in this cause that it did not state a cause of action, and had a judgment thereon.

Plaintiff brings the case into this Court. The declaration is as follows:

"Catharine Amperse, the plaintiff in this case, by O. T. Tuthill, her attorney, complains of George C. Winslow, the defendant, who has been summoned to answer the said plaintiff in an action of trespass on the case.

"For that whereas, the plaintiff is a resident and a citizen of the city of Kalamazoo, State of Michigan, and has been continually therein for ten years and upwards, and was on or about the month of May, 1885.

"That she then desired to commence and continue the business in which she was theretofore engaged, of selling spirituous and malt liquors at retail at the place of business kept by her husband in said city, and on or about the twentieth of said month, to enable her under the law of the State to legally engage in and carry on said business, presented to the common council of said city, of which said defendant was then a member, as alderman elect thereof, a good and sufficient bond, in the sum of $3,000, to the people of the State of Michigan, duly made and signed and sealed by the plaintiff as principal, and William Boylan and Samuel Rosenbaum, of said city, as sureties, both being residents and freeholders therein, each of whom justified in the sum of $3,000 over and above all indebtedness and all exemptions from levy and sale on execution and all liability on other similar bonds; and each of said sureties having made, and which was annexed to said bond, an affidavit as was required by section 9, of Act 259, Laws of 1881, being section 2278 of Howell's Annotated Statutes of Michigan, to which bond, now on file in the treasurer's office of said county of Kalamazoo, reference is hereby made.

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"And plaintiff avers that said bond in all respects—form, substance, number of sureties, justification, execution, and everything prescribed by the statute in such case made—was as the law requires and directs to be made and presented to the common council of said city by persons desirous of engaging in the business of the sale of spirituous and malt liquors therein, for the approval thereof, prior to engaging in the same, to enable such persons to legally carry on said business aforesaid.

"And plaintiff also avers that said city of Kalamazoo was then a duly incorporated city of said State by act of its Legislature, and by virtue of its charter regulations was governed by a common council, consisting of a mayor and ten aldermen, elected by vote of the people, qualified electors of said city, who by statute only could approve of liquor bonds, and hold regular meetings on the evenings of the first Monday of each month, and special meetings as called by the city council.

"And plaintiff further avers that upon one of said special meetings, to wit, the evening of May 25, 1885, the bond of the plaintiff having been submitted to them for their approval as the statute directs, and having theretofore been referred to the proper committee, that of licenses, were called upon to report on the said bond of the plaintiff, who through its chairman reported the same to the council as a good bond, the sureties thereon financially responsible, and the sum sufficient in all respects; and, on motion made, the report of the committee was accepted by the council, and placed on file; and thereupon Alderman Levy, of said city, moved the said bond of the plaintiff be approved by the council.

"No second to this motion being immediately made, the mayor proceeded to remark upon the expediency and policy of approving the bond of the plaintiff, and granting her license as applied for, on the ground and for the reason that several petitions were on file, signed by a number of individuals, requesting the council that no bond of the plaintiff be approved and she be granted no license for the year 1885, and for the reasons set forth in said petitions; whereupon Alderman Winslow called for the reading by the clerk of the council of the said petitions; and which being done, the council requested that the city attorney, Wm. G. Howard, Esq., who was present, address them, stating the law and the duty of the council in their action upon the matter of the bond of the plaintiff, and any liquor bond presented; and, in substance, Mr. Howard proceeded to say,—

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"'That the statute made no distinction between individuals; that any person who could present the requisite bond was entitled under the law to have his bond approved by the council, and licensed thereby to engage in the sale of liquors; and the council acting fairly under the law, and upon the report of the committee that the bond was found to be good in all respects, and there being no objections to the sureties, their financial responsibility and sufficiency, they were bound to approve it.'

"And the plaintiff avers that the duty of the defendant to vote for the approval of her bond, and cause the approval thereof to be indorsed thereon, was a corporate one, resting upon the municipality of the city of Kalamazoo in respect to its special and local interests, and upon him individually as a member of the common council, an officer and servant thereof, and which duty upon him was positive, absolute, and perfect, and not discretionary in him, or judicial in its nature, and one owing to the plaintiff, and her absolute right, in the performance of which she was specially interested, and which duty was specially conferred and imposed upon him as member of said council, and officer and servant of said municipality, by the statutes of this State; and the said defendant, acting under its authority, direction, and command thereof, as a member of said common council, to whom only could the plaintiff apply for the right and privilege of engaging in said business, absolutely omitted, neglected, and refused to perform said duty, well knowing that (or presumed to know) his acts in so doing was an actionable wrong and injury to the plaintiff, against him individually.

"And said plaintiff further avers that the common council of said city, the body designated by statute for the approval of liquor bonds (so called), to enable persons to legally engage in the sale of liquors as plaintiff in this case desired to do, absolutely then and there refused to approve the same and indorse their approval thereon as directed and commanded by the statute; and the said defendant willfully, wrongfully, and maliciously, and well knowing his duty therein in that regard, refused to vote, or influence said common council to vote, for the approval of said bond, and, in willful, stubborn disregard and violation of his duty to the plaintiff and the office of alderman in said council, he persisted in denying her the right she had under the law to have her bond approved, and utterly disregarding the law and instruction by which he was bound to act, and in defiance thereof, with full knowledge of the consequence thereof, refused to do his plain duty,—by which action and conduct

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of said defendant she was unable to engage in and carry on her business as aforesaid, and had to abandon the same until said common council, through a majority of its members, should approve said bond.

"And therefore, to attain her object and purpose without further trouble, damage, and expense, to influence and persuade said defendant to grant the plaintiff her rights and privileges to legally carry on a business, the plaintiff again, on the evening of Monday, the first day of June following, at the regular meeting of said council, through her attorney there present, most respectfully asked permission to address them upon the matter of the plaintiff before them, and, being granted the same, requested said council, in behalf of the plaintiff, to state any reason he or the council had, other than set forth in the said petitions, against approving the plaintiff's bond, if any such there were; if there was any other objection than the matter of said petitions, to state the same openly and fairly, so that there would be no mistaking their action, and the reasons therefor as they had assigned them at the time of disapproving said bond; and, further, that by their proceedings it did not appear that they had acted fairly upon the approval of said bond of the plaintiff as the statute required; and on behalf of the plaintiff he reoffered said bond to said council for the proper action by them on its approval. But said council and said defendant then and there failed and refused to further act on the approval thereof as requested, and refused to approve the same absolutely.

"And the plaintiff shows that said common council, at the said meeting held on June 1, as it did on May 25, 1885, adjourned without approving said bond, or indorsing thereon its approval, and did not and would not approve the same, and did not and would not give any other reasons for so refusing to indorse thereon its approval, other than the matter contained in said petitions directed to them as aforesaid against their approving the same.

"And plaintiff says she was ready, upon the approval of said bond by said common council, and intended, to present the same to the county treasurer of Kalamazoo county, and to pay the tax to said treasurer required to enable her, the said plaintiff, to carry on said business at the place aforesaid.

"And said plaintiff further says that, to compel the defendant and common council to approve her said bond, she was obliged to and did, to wit, on or about the ninth of June,

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1885, file a petition in the Supreme Court of this State, setting forth the said acts and conduct of said common council of the city of Kalamazoo relating to said bond, to compel said defendant by *mandamus* to approve her said bond; and thereupon, thereafter, upon the matter petitioned for being presented and heard by the said Supreme Court upon the proceedings had, and to bring the same to a hearing, an order was made by said Court, to wit, at the next January term thereof, that a peremptory writ of *mandamus* issue, requiring and compelling the city of Kalamazoo forthwith to approve the said bond aforesaid of the plaintiff, the relator in said petition named.

"And plaintiff avers that she was put to great cost, trouble, and expense in the proceedings she was compelled to take to the Supreme Court, and to make the defendant approve her bond, and to perform his plain duty required by the statute of the State, to wit, in the sum of $500, and sustained that loss and damage in the premises by the wrongful acts and willful conduct of the defendant in refusing to do what the law required.

"And that she also sustained great loss and damage by being deprived of the rights and privilege of engaging in and carrying on her legitimate business in a legal way, as prescribed by law, which she desired to commence and carry on as aforesaid, and being kept out and prevented from engaging in and carrying on the same by the defendant wrongfully and willfully refusing to approve the bond presented by her as aforesaid, until he was compelled to do so by writ of *mandamus* from the Supreme Court aforesaid, to wit, for the space of nine months, by reason of which she sustained a loss and damage in a large sum of money in the gains and profits of said business, in which she could have had and made during the said time, if the defendant by the approval of her said bond to him presented allowed her to engage in the same, in carrying it on as desired by her, to wit, in the sum of $1,500.

"And said plaintiff avers that the defendant well knew it was his plain and simple duty as alderman of said city, and member of the council thereof, to vote for the approval of all liquor bonds which are found and reported by the proper committee to whom it was referred to be good and sufficient, and for his willful and wrongful refusal so to do would make him individually liable to plaintiff for any and all loss and damage she might sustain by reason thereof; and that defendant has become and is liable for all such loss and damages as

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aforesaid which she has sustained in the premises by reason of said willful and wrongful intentional acts and conduct to the injury of plaintiff, and against her rights, of which he had notice.

"Whereupon the said plaintiff says that she has been injured, and has sustained loss and damage in the said several sums above named, by the wrongful and willful acts and conduct of the defendant aforesaid, and which she is entitled to have and to recover in this action, to wit, in the sum of $2,000.

"And therefore she brings suit, etc."

The gist of the plaintiff's action is that—

"Said defendant willfully, wrongfully, and maliciously, and well knowing his duty therein in that regard, refused to vote, or influence said common council to vote, for the approval of said bond."

The claim of plaintiff's counsel is:

1. That the plaintiff has a cause of action, not only against the city, but against any and every alderman in the council that can be shown, under the allegations of the declaration, to have acted willfully and arbitrarily in refusing to approve her bond.

2. That the declaration in this case is full and complete to admit all the necessary proofs of the liability of the defendant by reason of his conduct in the vote taking on the motion made for the approval of the bond.

3. That the defendant is individually liable in this action to the plaintiff, as well as the city in its corporate capacity, for the violation of his plain duty as a member of the council of the city of Kalamazoo, said duty being simply ministerial, and imperative on the council after the report of the committee on said bond.

4. That the declaration counts on all grounds necessary to the action, and is amply sufficient to admit proofs of everything required to sustain the willful, arbitrary conduct of the defendant.

In *Amperse v. City of Kalamazoo, ante,* 228, we held that no recovery could be had by the plaintiff against the city, even though the common council may have been guilty of willful misconduct in refusing to approve this bond.

But counsel now urges in the present case that the members of the council individually may be held liable for such

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willful misconduct, though the city cannot be made liable therefor.

The claim made is that the duty of the defendant, as alderman of the city of Kalamazoo, under the allegations of the declaration, was ministerial and not judicial in its nature; that all the duties judicial in their nature, relative to the approval of the bond, the sufficiency of the bond, and the sufficiency, residence, and character of the sureties, had already been passed upon by the committee reporting favorably upon the bond to the council, and that it then became the duty of the defendant, when the bond was so favorably reported back to the council by the committee, to vote for its approval, and his voting against its approval was evidence of willful misconduct; that when the committee had so acted upon the bond, and reported it sufficient in amount, and with satisfactory sureties, all these matters then had in effect passed into judgment, and were not subject to criticism or review by defendant or any member of the council; that all matters requiring investigation, inquiry, discretion, and judgment in regard to the amount and form of the bond, the number and character of the sureties, their residence and standing, had been determined for the council and the defendant by the committee, and there was only left the ministerial duty of approving the bond, which was refused.

The statute authorizing the giving of such bond, in force at the time this bond was presented, is Act No. 259, Laws of 1881.

Section 9 of this act gives the form of the bond, and provides—

"There shall also be annexed to each bond required by this act an affidavit of each surety thereto, which affidavit shall state that the affiant is worth a sum equal to the amount of the bond over and above all indebtedness and exemptions from sale on executions, and all liability on other similar bonds, and if, in the judgment of the township board or the

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boards of trustees or common council of the village or city in which such business is proposed to be carried on, said sureties, or either of them, are not worth the full sum mentioned in said bond over and above all their liabilities, and exemptions, and liabilities on other similar bonds, they, the said township board, or board of trustees, or common council of the village or city, as the case may be, shall refuse to indorse said bond with their approval," etc.

By the provisions of the statute the council had something more than a ministerial duty to perform. Their duties were to look to the form of the bond; see that it met all the requirements of the statute as to form, and that the penalty therein was as fixed by the council; and also to see that the affidavit of the sureties was in conformity to the statute, and satisfy themselves that each surety was worth a sum equal to the amount of the bond over and above all indebtedness and exemptions from sale on execution, and all liability on other similar bonds; and if, in their judgment, each surety was not worth this sum over and above all such indebtedness and exemptions from sale on executions and liability on other similar bonds, then it was their duty to disapprove the bond.

This duty is something more than ministerial. It is the exercise of judgment and discretion.

The fact that the bond is referred to a committee, to investigate and report upon, does not necessarily preclude a member of the council from further investigation. His judgment and conscience may not be satisfied as to the pecuniary responsibility of the sureties, simply because the matter has been investigated by some other member who is upon that committee. He still has the right to investigate for himself if he is not satisfied with the report, and if the bond is put upon its passage upon the report of the committee, and a member is not satisfied as to these facts, he not only has the right, but it would be his duty, to vote against the approval.

In the present case the bond was referred back by the com-

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mittee as a good bond, the sureties thereon financially responsible, and the sum sufficient in all respects, and on motion the report was accepted by the council, and placed on file. It seems that a motion was then made to approve the bond, but this motion had no second. When the mayor referred to the petitions on file against its approval, and the defendant called for their reading, after which the city attorney was called upon for an opinion as to the duty of the council in the premises, and having given such opinion that it was their duty to approve the bond, it is alleged that it became the duty of the defendant to vote for its approval to be indorsed thereon, but that he absolutely omitted, neglected, and refused to perform said duty, well knowing that (or presumed to know) his acts in so doing were an actionable wrong and injury to the plaintiff, against him individually.

The declaration then alleges:

"And the said defendant willfully, wrongfully, and maliciously, and well knowing his duty therein in that regard, refused to vote, or influence said common council to vote, for the approval of said bond, and, in willful, stubborn disregard and violation of his duty to the plaintiff and the office of alderman in said council, he persisted in denying her the right she had under the law to have her bond approved, and utterly disregarded the law and instruction by which he was bound to act, and in defiance thereof, with full knowledge of the consequences thereof, refused to do his plain duty."

The declaration seems to be framed upon the theory that after the report from the committee stating the bond was in proper form, and the sureties financially responsible, and the instructions from the city attorney that it was the duty of the council to approve it, then each individual alderman was at once bound to vote for its approval, and, failing in this, each was guilty of a willful violation of duty, for which plaintiff had a right of action for damages.

Neither the committee to whom the bond was referred, nor city the attorney, were the keepers of the consciences of the

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other members of the council, nor were their judgments to be placed as judgments of the other members. The statute makes it the duty of the council to determine the penalty of the bond within certain limits, as well as the sufficiency of the sureties. These are judicial inquiries and determinations. This has been repeatedly so held by this Court; and upon application for *mandamus* to compel these officers to approve liquor bonds, where it is made to appear that the council were not satisfied with the form or penalty of the bond, or the sufficiency of the sureties, the writ is always denied; and it is well settled that in all matters resting in the judgment and discretion of such boards, and upon which they have actually passed, *mandamus* will not lie to control their decision or action, when made or taken in good faith. High, Extr. Rem. § 323; *Sandlake v. Berlin*, 2 Cow. 485; *Pfister v. State*, 82 Ind. 382; *Albin v. Board of Directors*, 58 Iowa, 77 (12 N. W. Rep. 134).

There is no claim made in the declaration that the defendant acted willfully and maliciously, and in disregard of his duty, except in that he refused to vote for, and influence the other aldermen to vote for, the approval of this bond after the same had been reported favorably by the committee, and after the city attorney had instructed the council as to its duty in the premises, and the fact that at the June meeting of the council it again refused to approve the bond without assigning any reason therefor.

Admitting these facts, it would not constitute a cause of action. The defendant may have acted honestly in refusing to vote for its approval, and it was a matter to be by him judicially determined. In the performance of this duty the members of the council are the judges acting within the scope and limit of the authority conferred by this statute, and they cannot be made liable for acts judicial in their nature in a civil action, however erroneous or wrongful their determination may be. If they refuse to act, upon

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proper application to a court of competent jurisdiction they may be compelled to do so. And, if a member of such board should be guilty of any willful and corrupt misconduct, no doubt a criminal prosecution would lie for such misconduct.

In *Wall v. Trumbull*, 16 Mich. 235, the principle was stated by this Court that—

"A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it, and he must be held liable for any failure to do so which results in the injury of another.

"A judicial officer, on the other hand, has certain powers confided to him, to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him in every case to decide correctly at his peril. It is accordingly a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, was within the scope of his jurisdiction."

Another very serious defect is apparent in the declaration, even if it contained sufficient other allegations to maintain the action. It does not appear, and is nowhere alleged, that, even if the defendant had voted for the approval of the bond, and had used his influence with the other members of the council thereto, the bond would have been approved. The declaration does not state that any member of the council voted to approve it, but the implication is that the whole number of aldermen on the council voted against it. If, then, the defendant had voted for its approval, and fulfilled his duty as claimed by the plaintiff, the result would have been the same, and the plaintiff would have sustained the same injury as that of which she now complains.

Even though the defendant may have been acting in a ministerial capacity, and have willfully violated his plain duty, yet if the plaintiff was not injured by this willful misconduct, then no cause of action would arise upon which a claim for damages could be based, and what the motive of defend-

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ant was in voting against its approval would not aid the plaintiff's case. The action could not be maintained unless damages resulted to the plaintiff by such willful misconduct. This is not made to appear by the declaration.

In any view of the case, we are satisfied the declaration does not state a cause of action, and the judgment of the court below must be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred.

MORSE, J. I concur in the result, but, if damage could be shown from a willful and malicious refusal to approve a liquor bond which was perfect and complied with the statute in all respects, I think an action would lie against those causing such damage.

The declaration, in my opinion, shows that defendant's refusal to vote for the approval of the bond was willful, and in known violation of his duty under the law. The trouble is that the declaration fails to show that the action of the defendant, as therein set forth, was the occasion of any damage to the plaintiff.

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CHARLES COOPER ET AL. v. SAMUEL SMITH AND ELIZABETH SMITH.

Foreclosure of mortgage—Assignment of one of mortgage notes—Good-faith purchaser—Subscribing witness—Acknowledgment—Evidence.

1. A foreclosure bill filed by an assignee who claims to be the owner of *one* of *four* mortgage notes should account for the remaining notes, but, if their payment is shown on the hearing, the defect, as one of pleading, may be disregarded.
2. The failure of a complainant in a foreclosure suit to make out a complete title to the mortgage as a *valid* security will bar relief in the equity court.
3. The burden of proof is upon the complainants in a foreclosure suit, prosecuted by them as alleged *bona fide* holders of the mortgage, to establish *such* fact, where it is conceded that it would be fraudulent for their assignor to make any claim to the mortgage note, which he should have delivered up to the maker.
4. The testimony of a subscribing witness that he did not see the instrument executed, but signed as such witness because he knew the handwriting of the party executing it, destroys his character as such witness.
5. The words "signed, sealed, and acknowledged in my presence the day and year aforesaid," and signed "John J. Kaiting, Notary Public," falls short of any such certificate of acknowledgment as has been held sufficient to make evidence.
6. A mortgagor of a mortgage may at any time require a retransfer upon satisfying the secured debt. *Graydon v. Church*, 7 Mich. 36.
7. A foreclosure bill filed by an assignee whose assignment shows upon its face that it is not *absolute* should set forth the *existence* and *amount* of the notes to secure which he holds it, and the assignor should be made a party to the suit.
8. While it has been held that an *innocent* indorsee of a negotiable mortgage note takes the same title to the mortgage as to the note, yet this is because the two papers are bound together by such references as identify the one as collateral to the other; and it is not clear that said rule applies when he can only show his right to enforce the mortgage *at all* by *parol* evidence of extrinsic facts.

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9. Generally speaking, every assignee of a mortgage takes it subject to existing equities, and no purchaser can safely rely on inquiry made of his assignor alone, but if inquiry becomes necessary resort must usually be had to the debtor also.
10. On the facts in this case, as found, the bill is held to have been properly dismissed.

Appeal from Huron. (Beach, J.) Argued April 19, 1889. Decided June 14, 1889.

Bill to foreclose a mortgage. Complainants appeal from decree dismissing the bill. Affirmed. The facts are stated in the opinion.

George P. Voorheis, for complainants.

William Potter, for defendants.

CAMPBELL, J. This is a foreclosure suit appealed from Huron county. Some of the issues raised by the pleadings were tried by the jury, whose findings were adverse to complainants. The court below dismissed the bill, partly on the issues found adversely by the jury, and partly on a ground that the jury did not pass on. Complainants on the trial below made a preliminary objection that the finding of the jury would not be final, upon which no ruling was made by the circuit judge.

The court below ruled out more or less testimony, but chiefly against defendants' objection, and none that was material for complainants on the issues which became important. The appeal was in the usual form. Several of the questions presented by the argument do not appear to have any bearing on the record presented to us, and on which we must act. But, so far as any jurisdictional or constitutional question is intended to refer to the validity or operation of the amendatory act of 1887, which is supposed to make serious changes in practice in chancery, we do not think any such matter is before us. We cannot find in the record any

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written demand for a jury, based on the act of 1887. There are several important issues that were not submitted to the jury, and the decree while following the findings in part, disregarded them in part, and was based on a matter not laid before the jury at all. The case, therefore, is one on which special and partial issues were framed, which it was always proper to have laid before juries, and in which the court below had a right to follow the verdict if it saw fit.

In the view we take of the case we find no occasion to treat it as affected one way or the other by the law of 1887. That statute is peculiar, and, if the case required it, would compel us to consider some important questions.[1] But that necessity does not arise.

The question before us is whether the bill was improperly dismissed. If it was not, then the questions of practice are of no account.

The bill printed in the record—which we suppose is the amended bill—sets out this case: That defendant Samuel Smith, on or about the eleventh day of September, 1883, made and delivered to Henry Gibbard four promissory notes, the third of which was set out in words, and was for $500, payable to Henry Gibbard or bearer, on February 1, 1886, interest at seven per cent.

That Samuel Smith and Elizabeth, his wife, the two defendants, on the same day made a mortgage on an 80-acre tract, described in the bill (which was in the mortgage so described as only to cover half of it, and a correction of which is prayed for), to secure $2,150, of which this note was a part. The other notes are not described in the bill, and there is nothing to show what became of them.

The bill further avers that the note was sold and assigned to complainants December 1, 1885, for a valuable consideration paid to Gibbard, the receipt whereof he acknowledged;

[1] See *Brown v. Kalamazoo Circuit Judge*, *post*, 274, where the act of 1887 was held unconstitutional.

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and it was agreed he should immediately execute and deliver to complainants an assignment of the mortgage, which he failed to do till October 19, 1886, when he executed, acknowledged, and delivered it,—

"And that your orators by such assignment and delivery of said mortgage became the owners thereof in good faith, and for a valuable consideration, before maturity."

No question is raised specifically, except as affected by fraud in the transfer, against correcting the description in the mortgage. No other persons are mentioned as interested in the mortgage or lands.

This bill, as it stands, would be defective in not accounting for the other notes, which presumptively would belong to Gibbard or some assignee; but, as it appeared that these notes were paid and discharged, this defect, as one of pleading, may be disregarded. But upon the testimony these notes become important on other accounts.

The defendants set up by way of specific defense that all of the notes, including the one in suit, had been satisfied, and there was no admission in the answer or elsewhere of any rights in complainants, or any transfer to them. This becomes important in determining whether on the record as it stands complainants made out any case. It is to be borne in mind that this is not a suit at law on the note, but a proceeding to foreclose a mortgage, and, if complainants fail to make out a complete title to the mortgage as a valid security, the remedy on the note—which in a foreclosure suit is merely incidental, and in which defendant Elizabeth has no liability—could not have been sought in this court in equity.

There was proof tending to show—but which the jury did not believe—that the note was transferred to complainants on December 18, 1885, which was before its maturity. The jury found—as the court below also found, and as we think the evidence clearly shows—such facts as made it fraudulent in Gibbard to make any claim on the note. And beyond the

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issues laid before the jury it was evidently found—and we think rightly found, as we should certainly find from the proofs—that this note should have been delivered up to defendant Smith, and, if so, it was a fraud in Gibbard to attempt to transfer it to complainants. And the record presents an inquiry whether, by what took place, complainants became entitled to set up any claim as *bona fide* holders of the mortgage, and to what extent. Upon this, as the fraud is beyond a doubt, the burden is on complainants.

Upon this point there is no testimony in the record but that of Gibbard, who cannot be a truthful witness if the other witnesses tell the truth; and we are inclined, as the court and jury below were, to believe the other witnesses.

This note, being payable to bearer, would pass by delivery, and complainants would not be obliged in an action at law, probably, to show their relations as partners. But when any right depends on their partnership, and there is nothing in the record to identify them with it, it is not very clear that they can make that out by mere presumption,—especially when it becomes necessary to find out whether these complainants, who are named in the bill, are the persons, if any, who became *bona fide* holders of this paper.

A receipt is produced purporting to be dated on December 18, 1885, which reads as follows:

"Received of Henry Gibbard a note (collateral to his notes to us) on Samuel Smith, due February 1, 1886, for five hundred dollars, secured by real estate mortgage on 80 acres of land. C. & G. Cooper & Co.

"Butler."

On the nineteenth of October, 1886, Gibbard executed on the back of the original mortgage this assignment,—being more than eight months after the note in suit was due:

"I hereby assign this mortgage to C. & G. Cooper & Co., with full power to foreclose the same in my name or in their own, as to the note for five hundred dollars, due February 1, 1886, with seven per cent. interest from September 11,

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1883, proceeds to be credited on my indebtedness to them. Witness my hand this nineteenth day of October, 1886.

"HENRY GIBBARD."

The acknowledgment of this assignment is imperfect, but no question is made on its execution.

There is no testimony that we have found in the record sufficient to identify complainants in any legal way with C. & G. Cooper & Co. There is none of the complainants whose first or sole initial is "G." This point, in itself, might not be one which could not be easily rectified, and we do not base our decision upon it. But in all probability any witness who could have identified them might also have been examined on some matters of great importance, which should have been cleared up. None of the complainants was on the stand, and none of their agents. It appears that the receipt purporting to bear date December 18, 1885, was made by one Butler in their name. Butler was not sworn, and his agency is left to inference. The assignment of October, 1886, is witnessed by one Brent, who is referred to in some of the testimony as also one of their agents, and he is not sworn. The other subscribing witness is complainants' solicitor, who testified that he did not see it executed, and put his name on as a witness because he knew Gibbard's handwriting. This destroys his character of a subscribing witness, and he knows nothing about the circumstances. What purports to be an acknowledgment is no proper certificate. It reads as follows:

"Signed, sealed, and acknowledged in my presence the day and year aforesaid.

"JOHN J. KAITING, Notary Public."

This falls short of any such certificate of acknowledgment as has been held sufficient to make legal evidence. There is also nothing in the certificate to show where it was made, or in what state or county Mr. Kaiting was a notary public. Mr. Kaiting was not sworn. The whole question of the

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assignments of note and mortgage depends on the uncorroborated testimony of Gibbard, who assigned both for a fraudulent purpose. A failure to produce either of the witnesses, who were probably disinterested, is certainly an unfortunate omission, and makes it proper to apply the rigid rules of law to the case as presented. Gibbard knew that he was committing what must be deemed a fraud. It is important to understand what was known to these agents, or to complainants, and no one else testifies.

Gibbard's testimony is peculiar. When cross-examined concerning the transfer of this note, he at first said it was given in satisfaction of a debt, and then, after stating he got a receipt, he said it was turned out to apply on the debt if they could collect it. The receipt declares it to have been taken as "collateral to his notes to us." The assignment of October, 1886, says: "Proceeds to be credited on my indebtedness to them."

This is not the theory of the bill of complaint, which asserts complainants' title to have been by absolute sale. By the transaction as shown by the receipt and assignment, the complainants were not absolute owners of the mortgage and note, but held it merely as collateral to whatever claim they had against Gibbard. In other words, they were practically mortgagees of the mortgage, and Gibbard could at any time recall it and require a retransfer upon satisfying what he owed them. *Graydon v. Church*, 7 Mich. 36.

It was therefore incumbent on complainants, when the assignment on its face showed their title was not absolute, to set forth in their bill the existence and amount of the notes which they held it to secure, and to make Gibbard a party to the suit, so that all persons interested should be before the court. There is nothing in the record to amend by, for Gibbard does not give any distinct account of his dealings with Cooper & Co., and there is nothing in the record to show either the character or amount of the debt to complainants,

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or how much, if any, remains due. As against Gibbard, defendants are not liable at all, and therefore it is the more important that the record should enable them to contest and ascertain whether complainants have any lawful claim to the mortgage, and how much.

It is also to be remarked that, so far as the mortgage is concerned, there is nothing in it to identify this note. It purports to secure $2,150, with interest, according to three promissory notes. These notes are not described in it, and the times of payment and amounts of the installments are not given. As a matter of fact there were four notes, and not three; and three notes, including the last one, were acknowledged to be satisfied and cancelled. The mortgage does not say the notes were payable to bearer. The mortgage does not, therefore, on its face, furnish means of determining the rights of the parties under it. It requires extrinsic evidence to enable any one to enforce it, and this could not be done without resort to equity. While it has been held that an innocent indorsee of negotiable paper takes the same title to the mortgage as to the note, yet this is because the two papers are bound together by such references as identify the one as collateral to the other. There is nothing in this mortgage to identify it with the note, and it is not clear to us that a person can take a mortgage free from equities, when he can only show his right to enforce it at all by parol evidence of extrinsic facts. It was held in *Tucker v. Alger*, 30 Mich. 67, that a mortgage could not be held to cover a due-bill not described in it, without very clear proof of its identity with the debt referred to. Generally speaking, every assignee of a mortgage takes it subject to existing equities. This mortgage had already been paid, and should have been discharged before December, 1885, if the note was then actually transferred. When the note was transferred—if so transferred—this mortgage was not transferred in fact or delivered, and it could not have been identified by com-

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parison with the note alone. No purchaser could safely rely on inquiry made of his assignor alone. If inquiry becomes necessary, resort must usually be had to the debtor also.

We have, therefore, this state of things: The mortgage was in fact paid, and the note was fraudulently withheld and fraudulently transferred. The mortgage was not transferred till after the note matured, and its connection with the note did not appear on the face of either in such a way as to dispense with inquiry. It does not appear what was the precise state of accounts between Gibbard and complainants when the note was transferred, or when the bill was filed, or when the case was heard, and Gibbard was a necessary party to the litigation, not only because he had an interest in the mortgage, but also because defendants would have a right to relief against him, if held liable to complainants. A failure to show the circumstances of the transfer by Butler and Brent, or by some one else than Gibbard, and the vagueness of his testimony, and the fact that, so far as he is concerned, the wrong was beyond doubt, make it dangerous to solve any doubts by his testimony, which is fairly discredited. The equities of defendants existed when complainants took their securities, whatever may have been the time when it was done. We are not called on to decide how far a taking for collateral security operates in a proper case as a *bona fide* holding. The trouble is that the record fails to satisfy us of the circumstances, or to show what complainants' equities were; and the complainants have not, by either pleadings or proofs, properly alleged or proved the facts which are necessary to enable them to prevail.

Without regard, therefore, to the defects of oversight, that could perhaps be supplied, we do not think that the meritorious defense made out by the defendants has been overcome by the complainants on the facts. Neither do we think that the bill itself is properly framed to show the real facts, or helped out by proof where it is defective.

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The bill was properly dismissed, and the decree must be affirmed, with costs.

The other Justices concurred.

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JOHN G. OWEN v. AMANDA C. YALE.

Consent decree—Husband and wife—Agreement in contemplation of decree for divorce—Dower.

1. A consent decree cannot be appealed from.

   So *held*, where a wife filed a bill under How. Stat. § 6291, for maintenance, charging desertion, but not for the statutory period, and the husband's failure to suitably provide for and maintain her, but not in such a manner as to lay a foundation for a divorce under the general laws, to which bill an answer was filed fully meeting all of its allegations, and on the hearing the judge announced that a divorce would be granted; whereupon a decree was agreed upon, granting a divorce for desertion and a permanent alimony, which was paid by the husband.

2. A *consent* decree, made after the announcement by the court that a divorce would be granted, providing for such divorce and for the payment of a gross sum as alimony, "the same to be in full of all claims of the complainant against the defendant or his property," which payment has been made according to the terms of the decree, is a bar to any claim by the wife to dower.

3. An agreement by husband and wife, made in contemplation of a judicial separation, by which provision is made by the husband and agreed on by the wife to stand in lieu of dower and all other claims of the wife on her husband's estate, and which by mutual consent is made a part of a decree for divorce, is valid, and estops both parties to it. *Randall v. Randall*, 37 Mich. 563

4. Evidence is admissible to show the assent of a party to and understanding of a *consent* decree, not to vary the decree, but to show that it was not entered without his knowledge and approval.

Appeal from Huron. (Beach, J.) Argued April 24, 1889. Decided June 14, 1889.

Bill to quiet title. Defendant appeals from decree grant-

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ing relief prayed for. Affirmed. The facts are stated in the opinion.

Winsor & Snover (*Hatch & Cooley*, of counsel), for complainant.

J. W. Bennett (*Martin Crocker* and *T. M. Crocker*, of counsel), for defendant.

CAMPBELL, J. Complainant, as owner and grantee of lands formerly owned by Francis Crawford, now deceased, filed this bill to quiet his title against the claim of dower of defendant, once his wife, who, as he claimed, had relinquished her dower by a voluntary arrangement during her former husband's life-time. The court below decreed to complainant the relief prayed, and defendant appeals.

In 1878, on January 22, defendant, proceeding under the act found in section 6291, How. Stat.,[1] filed a bill in the circuit court for the county of Washtenaw against Crawford, then her husband, for maintenance. The bill relied on what it charged as desertion, and also a failure to suitably provide for and maintain her. It did not set out such a period of desertion as would be ground for a divorce by itself, and it did not contain such charges of "grossly or wantonly and cruelly" failing to provide for her as to be a foundation for divorce under the general laws. It also set out that Mr. Crawford had filed a bill for divorce against her, and had discontinued it without her consent.

Mr. Crawford put in an answer, fully meeting all the allegations, and setting up counter-grievances. The case went to a hearing, but the record put in proof does not show what the proofs were. But it shows a consent decree upon a stipulation confirmed by the court, from which this appears:

On the hearing the judge announced that he would grant

[1] For important changes in this section see Act No. 90, Laws of 1887.

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a divorce, and suggested that the parties agree on the alimony to be granted the complainant, and its manner of payment. Thereupon a decree was agreed upon which, in the first place, granted a divorce for desertion, with leave to both parties to remarry, and then granted a gross sum of $20,000, alimony, "the same to be in full of all claims of said complainant against said defendant or his property," and payable $10,000 at or before the filing of the decree, and the remaining $10,000, with annual interest, at or before the husband's death, at his option, to be secured by mortgage as set forth, and on the lands therein described. The evidence showed that Mrs. Crawford expressly authorized her counsel to enter this decree, and understood its effect. It was, therefore, a consent decree in the full sense of the term, and within the power of her counsel to agree upon. The money was paid to and received by her, and the mortgage accepted and disposed of by her.

It is certainly open to some question whether Mrs. Crawford could have procured a divorce on her bill as it stood. But, according to all the authorities, a consent decree cannot be appealed from, and the decree was not absolutely void, whether erroneous or not. Before it became complete the money payment was to be made. After it was made she acted further upon it, and married another person, which would have been an adulterous marriage if this decree should not stand.

The decree was part of a contract whereby, while the parties were yet married, but in contemplation of a judicial separation, a provision was made by the husband and agreed on by the wife to stand in lieu of dower and all other claims of the wife on her husband's estate. Under the statute in pursuance of which the bill was filed the court could make no provision for the wife except for their joint lives, and it was always liable to change. Section 6293. This provision was absolute, and half was payable after that period. It stands

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on the footing of a mutual agreement, which by consent is made matter of record, which estopped both parties to it.

That such an agreement, made under such circumstances, is valid, was decided in *Randall v. Randall*, 37 Mich. 563, and we need not look further. There is much more doubt whether, after a divorce obtained on such a record, she would have been entitled to dower at all. But this is now unimportant. The decree is not, in our opinion, at all ambiguous. It was designed to leave Mrs. Crawford no further claim on her husband's property. Dower was the only claim she could possibly have had after divorce, if she had even that, and the decree meant that or it had no meaning. It was a contract which would have been lawful if not embodied in a decree; and, as stated in *Randall v. Randall*, it was not against public policy. It would certainly not be pleasant or conducive to peace and harmony to have one man's wife setting up a claim of dower in another living man's property; and a contract preventing such a result for a pecuniary consideration is not one of evil tendency.

We think the decree speaks for itself. But we think also that it was not improper to show defendant's previous assent and understanding of it as not entered without her knowledge and approval. We do not regard it as varying the decree in any way, and it could not be received for any such purpose.

The decree must be affirmed, with costs.

The other Justices concurred.

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JONATHAN W. COBBS v. JARED H. HIXSON ET AL.

Public officers—Agreement to perform duties of city treasurer—Bond—Public policy.

A bond given by an outgoing city treasurer to his successor to secure the performance of an agreement between the two, pursuant to which the obligee became a candidate for said office and the obligor for mayor, who was to continue to perform all of the duties of treasurer, he being at the time a defaulter, which fact was unknown to the public, but was communicated to said obligee, cannot be held valid for any purpose.

Error to Wexford. (Aldrich, J.) Argued April 24, 1889. Decided June 14, 1889.

Debt. Defendants bring error. Reversed, and new trial denied. The facts are stated in the opinion.

Smiley & Earle (*J. R. Bishop*, of counsel), for appellants.

M. O. Burch, for plaintiff.

CAMPBELL, J. Plaintiff, who was treasurer of the city of Cadillac, intrusted defendant Hixson with the custody and management of the city funds, and took his bond, with the other defendants as sureties, to secure his faithful conduct. The defendants rely for defense on illegality in the arrangement, and on fraud alleged to have been committed against them by not informing them of the situation.

Hixson, in the spring of 1886, being city treasurer, had mingled the city funds with his own, and was not in a condition to realize from his investments, without some delay; the sum for which he was accountable being about $9,000, which, with other moneys, he had put into logs.

The story that Hixson told, which may have done injustice

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to Mr. Cummer, who was mayor, and going out, is that Cummer asked Hixson to take a nomination as mayor, for which the election would be assured.

As Mr. Cummer was neither party nor witness, he of course was not able to be heard in the cause, and should not be misjudged.

Hixson says he told him that he expected to run again and be elected as treasurer, and that the condition of the funds was such, as before stated, as would prevent him, if he left the treasury, from being able to procure the funds to settle up with, while, if he continued in office, he could meet all orders as they came along, and get back his money; that he told Cummer that, unless he could find some one who would leave the funds in his hands, he could not accept the nomination as mayor, because he could not afford to take the money out of his business; that Cummer said that any one of Hixson's friends who would leave the funds in his hands, and was acceptable, could be elected treasurer. Hixson then applied to plaintiff, telling him what he said had taken place with Cummer, and assuring him that if he would consent to run for treasurer he would keep the accounts as before,—would keep the books, render reports, pay vouchers, and plaintiff need do nothing but sign the reports. He also told him how he had invested in the logs, which would bring in a good return, and be profitable. Plaintiff agreed, and both were elected. This bond was given to secure the proper accounting, reporting, and payment of the funds, as the city treasurer was bound to do. Plaintiff receipted for the balance due on the closing of Hixson's term, and Hixson received and paid out in the usual way the city funds. He paid out rather more than he received from various sources, but in some specific funds the receipts exceeded expenditures, and for these excesses judgment was rendered on the bond, but no recovery was allowed for the balance which was due when

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Hixson left office, and which remained invested, with his private funds, in the logs.

Whether, if the dealings were otherwise legal, the sureties would be discharged by their ignorance of what Hixson had done with the funds which he should have paid over on leaving office, is a question we shall not consider. It does not appear from the record how much or how little the sureties knew about the facts, and no one but Hixson has thrown any blame on Mr. Cummer. The nature of the dealings as legal or illegal is a more important question, and fairly presented.

The charter of Cadillac, being made subject to the general law concerning the incorporation of cities, has not left the treasurer at liberty to treat the public funds as his own. By section 2481, How. Stat., the treasurer is expressly required to keep all public money separate from his own money, and a failure to do this renders him liable to summary dismissal from office.

This case presents the singular case of a man representing that the retiring mayor was assuming and agreeing to provide Hixson and plaintiff with the two most important offices in the city, and their election, with an understanding between Hixson and his successor that, except in name, Hixson was to fill both offices. The statute provides that no defaulter to the city or any public body shall be elected to any city office, and that such election shall be void. Section 2439. In this case Hixson and plaintiff, at least, combined to conceal Hixson's misconduct, and to put him in one high office, and to put plaintiff in his place in the financial office, in which he had defaulted and violated his duty. The express purpose was for screening him from liability, and continuing him in custody of the funds of the office in which he had been guilty of malversation, and representing moneys as paid over and accounted for which he had invested illegally in his own name and could not produce,

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and which by his subsequent failure were lost, so far as he is concerned, although plaintiff had to answer for them.

It is bad enough for any person or combination to undertake to dispose of elective offices. But it would be difficult to imagine any worse means of corruption and mischief than conspiring and succeeding in disposing of them for the express purpose of concealing the misconduct of a financial officer, which made him legally disqualified for holding longer, and putting at the head of the city government a defaulter, who would not have been eligible to any office at all.

The bond in suit here was given in pursuance and furtherance of the illegal agreement referred to, and cannot be held valid for any purpose. It is not pleasant to think that people of any city can have elective offices filled by such methods. To hold that such intrigues can be legally carried out would be monstrous.

A community that would knowingly tolerate it would not be fit for self-government. Persons who have taken part in such dealings cannot ask courts to enforce their bargains.

The judgment must be reversed, with costs of both courts. As the nature of the arrangement appears from the showing for the plaintiff, there should be no new trial granted.

The other Justices concurred.

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THE TOWNSHIP BOARD OF ECORSE v. THE BOARD OF SUPERVISORS OF WAYNE COUNTY.

Bridges—Stream forming boundary between two townships—Authority of board of supervisors—Draw-bridge.

1. Act. No. 62, Laws of 1889, providing for the construction of bridges over streams which form the boundary line between two townships, does not apply to a *navigable* river, over which it would be necessary to construct a *draw-bridge*, and maintain and manage the same during the season of navigation.
2. The duty of maintaining a draw-bridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw.

Mandamus to compel the board of supervisors of Wayne county to take action under Act No. 62, Laws of 1889. Submitted June 4, 1889. Denied June 14, 1889. The facts are stated in the opinion.

Fred H. Warren, for relator.

Henry M. Duffield, for respondent.

CHAMPLIN, J. The township of Ecorse is situated on the west bank of Detroit river.

The township of Springwells lies immediately north of the township of Ecorse, the dividing line between the two townships being the river Rouge, which rises in the southern part of Oakland county, flowing south and south-easterly through the townships of Redford and Dearborn, thence easterly between the townships of Springwells and Ecorse to its confluence with the Detroit river.

From a distance of some 10 or 15 miles westerly from the Detroit river the Rouge is a navigable river, which will admit of the passage of boats and vessels drawing not to exceed 14

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feet of water. Appropriations have been made by the federal government and expended in dredging the stream.

A highway known as the "Detroit and Monroe Road" runs through said townships of Springwells and Ecorse, and crosses the river Rouge by a bridge that has been maintained for 70 years and upwards.

In the year 1867 a new bridge was built by the townships of Springwells and Ecorse jointly, since which time it has been maintained and operated by said townships until the year 1886, when the township of Springwells abandoned the same, and has ever since refused to contribute anything towards operating or keeping the same in repair. This bridge is an "old-fashioned lift bridge," and is in a very dilapidated and unsafe condition, and a new bridge is an imperative public necessity.

On or about the twenty-third day of April, 1889, there was presented to the township board of the township of Ecorse a petition signed by 17 freeholders of the township, setting forth that the bridge over the river Rouge was in a dangerous and unsafe condition for public travel, and a partial obstruction to navigation, and that a new bridge is a public necessity, and asking said board to take the necessary steps under provisions of Act No. 62, Laws of 1889, to call a special session of the board of supervisors of Wayne county to consider the subject.

On the twenty-seventh day of April, 1889, said township board of the township of Ecorse passed a series of resolutions setting forth the unsafe condition of the bridge, the abandonment thereof by the township of Springwells, the public necessity for a new bridge, and requesting the township of Springwells to join with the township of Ecorse in building and maintaining a new bridge, which resolutions were served upon the township board of Springwells on the twenty-ninth day of April while in session; and on the same day the township board of Springwells, by resolution unani-

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mously adopted, refused said request, and then and there declined to join with the township of Ecorse in building and maintaining a new bridge over said river Rouge, or to join in the repair of the present one, a certified copy of which action was, on the same day, transmitted to the township board of Ecorse, who thereupon filed with William P. Lane, clerk of the board of supervisors of the county of Wayne, a petition setting forth the facts above stated, and praying that the board meet in special session and determine—

"1. That a new bridge at the point named is a public necessity.

"2. To determine the kind of a bridge to be constructed, and the maximum cost thereof.

"3. To determine whether the cost of said bridge shall be raised in one or two years.

"4. To issue an order for the construction of said bridge, and that it compel the township of Springwells to join with the township of Ecorse in the erection and maintenance thereof.

"5. That it fix the respective portions which each township shall contribute for the construction of such bridge, and for keeping the same in repair, and operating the draw thereon.

"6. That it take such other action as is made necessary by Act No. 254, Session Laws of 1889."

In compliance with this petition the clerk of the board of supervisors called a special session of that body, which convened on the sixteenth day of May, 1889, and heard the petition, as well as the petition of a large number of freeholders of the township of Springwells, which were referred to a committee, with instructions to examine and report the result thereof, together with their opinion, to said board.

Said committee visited the locality of the proposed bridge, heard testimony and listened to arguments, and afterwards, and on the twenty-fifth day of May, 1889, presented to said board their report, reciting the dangerous condition of said bridge, the immediate public necessity of a new bridge, and

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recommending the construction of a new iron swing-bridge, to cost not to exceed $20,000.

The committee further recommended that the township of Springwells join with the township of Ecorse in the construction of such bridge, the expense thereof to be borne equally between such townships, and that a sufficient sum to build the bridge be raised by taxation upon the taxable property of the townships in two years, viz., 60 per cent. in the year 1889, and 40 per cent. in the year 1890; and that the expense of operating the bridge, when constructed, should be borne equally by the townships.

The board of supervisors laid the report upon the table, and resolved that the act of the Legislature did not cover navigable streams or swing-bridges, and that they had no discretion in the matter, nor authority to act, and therefore denied the petition of the township board of Ecorse.

The township board of Ecorse have presented a petition to this Court for an order upon the board of supervisors, based upon the foregoing facts, to show cause why a peremptory *mandamus* should not issue commanding them to reconvene and consider said petition, the report, preamble, and resolutions of their committee, and exercise the discretion and authority conferred upon them by said act. The proceedings of the board of supervisors, and the report of the committee, as well as the protest of the township of Springwells, are attached to and made a part of the petition.

The protest of the supervisor of Springwells asserts that the cost of the bridge will exceed $22,000, and the annual expense of maintaining the bridge as a draw-bridge will exceed the sum of $1,500 annually; that the act referred to nowhere confers power upon the board to apportion and assess the expense of maintaining the bridge as a draw-bridge; that it was not the intention of the Legislature that such act should extend to draw-bridges.

The first section of the act referred to, which is Act No.

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62, Laws of 1889 (it being Senate bill No. 254), provides that whenever any township shall be desirous of having a bridge constructed which, when built, will be partly in one township and partly in another, and the adjoining township shall be unwilling or refuse to join in the construction of such bridge, such township may apply to the board of supervisors of the county for an order for the construction of such bridge, and for fixing the respective portions which each township shall contribute for the construction and keeping in repair of such bridge, as well as for deciding what kind of bridge shall be constructed.

The second section provides for the calling of a meeting of the board of supervisors, and the time and notice to be given of such meeting.

The third section reads as follows:

"At such meeting said board of supervisors shall have the power and it shall be their duty to grant or refuse the prayer of said petitioner. And if they shall grant the same they shall describe the kind of bridge to be built, and the limit of cost which it shall not exceed; and, for the purpose of facilitating their determination of the kind and cost of the bridge, each township, city, and village named in the petition may present a plan or plans and specifications of such proposed bridge, with or without drawings, and an estimate of each as to cost.

"Said board shall also determine the quota or proportion which each township, city, and village named shall contribute thereto, and whether the whole amount shall be raised the first year, or a part, and what part the first and what part the second year, but no part of it shall be deferred more than two years.

"They shall also determine the quota of each towards keeping the same in repair, which shall remain the same till altered by said board, or by the consent of each township, city, and village which is a party to this proceeding."

Section 4 provides that upon determining that such bridge shall be built, and the other matters mentioned in section 3, then the board of supervisors shall order the county treasurer to open an account with each township whose quota

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they have determined, under the designation of "the bridge fund" (naming the bridge), charging to each the quota so assigned by the board, and through their clerk to serve a copy of the order upon the assessing officers of the townships, respectively, and upon the collecting officers of such townships, and thereupon it is made the duty of such assessing officers to assess, and such collecting officers to collect, the taxes assigned for such townships respectively. The collectors are required to give a bond to the county treasurer. The board of supervisors are to issue their warrant to each of said collecting officers, requiring them to collect and pay over the amounts to the county treasurer to apply on the bridge fund.

Section 5 authorizes the board as such, or through a committee of three of their members, as their agents, at any time after they have made the order for raising such bridge fund, to contract for the building of such bridge as an entirety, or for any materials or labor for the same, if they prefer to build it without contract as a whole, in which case they or their committee may employ an overseer, but in all cases to be payable only out of the bridge fund when and as collected. If let by contract, notice of letting is provided for. The board, as such, or its committee, as agents, are to determine whether such bridge is completed according to the plans or contract; but if the township boards in behalf of which it is built shall admit to such board, or its committee and agents, its full completion, it shall be conclusive of the question.

Section 6 provides that a full account shall be kept by the clerk of the board of supervisors of all expenses to the county in carrying the act into effect in any such case, and when the bridge is completed the amount is to be certified to the county treasurer, and charged to the account of the bridge fund, to each township in the ratio established by the board for such bridge, which amount, together with any balance of

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the bridge fund unpaid, shall be raised by tax in each township, as above provided for the construction of the bridge.

It appears from the above statute that when a stream forms the boundary line between two townships, and a highway crosses from one township into another which the respective townships are by law bound to keep in repair, and the adjoining townships cannot agree upon joint action in constructing a bridge across such stream, the board of supervisors may, upon the application of one of such townships, proceed to construct such bridge, and assess and collect the cost thereof from the townships into which the bridge extends, assessing upon each such proportion of the cost as they see fit.

To all intents and purposes the bridge constructed under this act is a county bridge. The board of supervisors determine its necessity, prescribe its plans, contract for building it or hire it to be done, determine its cost, direct the assessment of the tax, issue their warrant for its collection, and receive and pay out the money. All the townships are permitted to do is to present plans, which the supervisors may adopt or not, and admit to the board that the bridge is completed if theychoose to do so. The statute makes the two townships the assessing districts, but leaves it to the board of supervisors to apportion the cost and expense between the townships, without any fixed standard of apportionment.

There are several difficulties which have suggested themselves to us in the examination of this law which may affect its validity, which we shall not mention at this time, as we have not had the benefit of an argument upon them, but which have been somewhat discussed in our previous decisions. *People v. Highway Commissioners*, 15 Mich. 347; *People v. State Treasurer*, 23 Id. 499; *People v. Supervisors*, 26 Id. 22; *Attorney General v. Supervisors*, 34 Id. 46; *Thomas v. Gain*, 35 Id. 164, 165; Const. Mich. Art. 10, §§ 9, 11.

We do not think the act was intended to apply to naviga-

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ble rivers, where it would be necessary to construct a draw-bridge, and maintain and manage the same during the season of navigation. The law provides that the board of supervisors shall determine the kind of bridge to be built; but this refers to material and plan, and not whether it shall be a draw, lift, or swing bridge.

There are three things, and only three things, which the board of supervisors are authorized to determine and apportion to the townships, viz., the cost of the structure, the expense of constructing, and the quota of each towards keeping the bridge in repair.

Nothing is said about the expense of maintaining and operating the draw, which is an important item, and one not likely to be overlooked had it been the intention of the Legislature to include the bridging of navigable rivers. Which township is to provide the servants to operate the draw, and who is to be responsible for their negligence?

"The duty of maintaining a draw-bridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw." 2 Amer. & Eng. Cyclop. Law, 549; *Weisenberg v. Winneconne*, 56 Wis. 667 (14 N. W. Rep. 871); *Egerton v. Mayor*, 27 Fed. Rep. 230.

In view of the responsibility attaching to the construction of a draw-bridge, not only as to navigation but to the traveling public, we should not feel inclined to hold that the act was intended to cover the construction of draw-bridges, unless clearly expressed in its terms, or is necessarily implied by it.

Where a township refuses voluntarily to assume the burden and obligation of constructing and maintaining a draw-bridge, the burden and the obligation cannot be forced upon it by the board of supervisors without an express grant from the Legislature authorizing them to impose such burden.

Under the law as it stands the board of supervisors are authorized to build a bridge, but they are not authorized to maintain and operate a draw in it, and no navigable river can

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be bridged without providing some means for the passage of vessels without unnecessary delay.

The act, by its terms, refers only to such bridges as, when constructed and kept in repair, are made safe for the traveling public. The application is therefore denied.

The other Justices concurred.

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MOSES C. MYERS v. BERNARD KAICHEN.

Libel and slander—Reply to newspaper communication.

A communication to a newspaper, called out as an answer to a libelous article published against the party sending it, and not going beyond what was fairly to be expected of a man who might very well have been exasperated, instead of being good-naturedly contemptuous, will not support an action for libel.

Error to Alpena. (Kelley, J.) Argued June 5, 1889. Decided June 14, 1889.

Case for libel. Plaintiff brings error. Affirmed. The facts are sufficiently stated in the opinion.

Turnbull & Dafoe, for appellant.

Shields & McNamara, for defendant.

CAMPBELL, J. Plaintiff sued defendant in an action of libel for an article which purported to be and was in fact called out as an answer to a libelous article published by plaintiff against defendant, and which contained reflections on defendant's motives, of an offensive character. The only language in defendant's article which used any word which is ever actionable in itself charged plaintiff with forging a rabbi's name to a published article. But as it appeared

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in the article itself that this merely referred to a newspaper communication, which, as it appeared, was a mere courteous disclaimer of a desire to receive a public benefit, this was not an offensive charge as made. And beyond this defendant's answer was nothing more than his own explanation and denial of the facts alleged by plaintiff, made in terms much less offensive than plaintiff's article, and much better natured. It was invited by what plaintiff said, and did not go beyond what was fairly to be expected of a man who might very well have been exasperated, instead of being good-naturedly contemptuous. It cannot be said that defendant went further in his comments than under the circumstances might be expected. The court below rightly held that no cause of action was made out.

We have purposely avoided quotation, because we do not think the reports of this Court should be made a medium for circulating small scandal that ought not to interest the public.

The judgment must be affirmed, with costs.

The other Justices concurred.

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EMILY J. BROWN v. GEORGE M. BUCK, CIRCUIT JUDGE OF KALAMAZOO COUNTY.

Constitutional law—Equity jurisdiction and practice—Jury—Appeal—Mandamus.

1. *Mandamus* is a proper remedy to compel an *original* hearing in a chancery suit.
2. Act No. 267, Laws of 1887, in so far as it assumes to provide for a final decision of questions of fact in chancery suits by the verdict of a jury, and for the rejection of testimony by the presiding judge, as in a suit at law, is unconstitutional.
3. As it is not competent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all the other State tribunals, no legislation which practically destroys it is valid.
4. The following propositions are summarized from the opinion of Justice CAMPBELL:

a—The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes and always must include it.

b—Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere.

c—The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore.

d—Laws passed for one purpose, and under one title or category, cannot be made to do duty under a foreign enactment, which was not in any way within their contemplated range.

e—The trial by jury in common-law cases is guarded by a large body of provisions designed to procure a fair and impartial jury, extending from the making of the jury-lists through the process of selecting and summoning regular jurors and talesmen to the completion of the panel through challenges and other tests, all of which provisions, whether statutory or not, belong to the machinery devised for the common-law courts, and cannot be adopted, without new and careful legislation, to anything else.

f—When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the

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court to have their respective interests charged or protected, and to end the controversy once for all.

g—When a case is tried by a common-law jury, one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of a judgment, which cannot in anything depart from it; and there is and can be no issue which the jury do not dispose of.

h—It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights.

i—The functions of judges in equity cases, in dealing with questions of fact and law, is as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases.

j—The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury.

k—Whatever may be the machinery for gathering testimony or enforcing decrees (in equity cases), the facts and the law must be decided together; and when a chancellor desires the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they cannot foreclose him in his conclusions unless they convince his judgment.

l—The constitutional provision directing the Legislature to abolish distinctions between law and equity proceedings, as far as practicable, does not blend legal and equitable interests, although favoring the removal of such as are nominal rather than real.

Mandamus to require respondent to set aside a decree in a chancery suit, tried by jury under the provisions of Act No. 267, Laws of 1887, and to hear it in the usual manner. Submitted June 4, 1889. Granted June 14, 1889. The facts are stated in the opinion.

Dallas Boudeman, for relator.

Hawes & Luby, for respondent.

CAMPBELL, J. Relator represents that in April, 1888, a bill in chancery was filed in Kalamazoo county by Sarah E. Field, to set aside a deed made to relator by Thomas B. Lord,

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who was father of both parties, upon the grounds generally set up in such cases, of fraud, undue influence, and incapacity. Issue being joined, the complainant made claim under the statute of 1887 for a trial by jury. This demand was allowed, and certain issues were submitted, which to some extent covered the charges, but not in a very tangible way, and the jury gave answers to the specific questions. The circuit judge, acting entirely on these answers, made a decree in favor of complainant, canceling the deed, and refused to exercise his own judgment in the case. A *mandamus* is asked to require him to set aside the decree, and to hear the cause and decide it himself.

It is due to the circuit judge to say that he took this course to enable the validity of the statute to be passed upon in this Court, inasmuch as this question has been raised in several parts of the State, and needs to be settled in order to procure uniformity of practice.

A preliminary objection was made to the use of the process of *mandamus* to determine the dispute, which it is insisted should come up by appeal. But there is no force in the objection. We are informed by the return that the circuit judge never passed upon the questions of fact himself. An appeal would, therefore, in some circumstances, and in one view of the case, require us to act as a tribunal of original powers, and not by way of review, which, in equity cases, is not in our province. It might also, and probably would, require us either to decide on a partial state of facts, or remand the cause for rehearing, which is not contemplated in chancery appeals. If the circuit judge was wrong in the theory on which he thought it his duty to act, the case has never been heard at all in any legal way. The *mandamus* is not asked as a means of reviewing the merits, but only to compel an original hearing. For this purpose it is a proper remedy.

The statutory provision now in controversy consists of a

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recasting of a section of the old Compiled Laws intended to give an opportunity of trial in open court, if the court deem it proper, and providing means in such case for securing a record of the testimony to be used on appeal. This section, which was originally section 3511 of the compilation of 1857, went through a number of changes before it became section 5093 of the compilation of 1871, and after several more changes appears as section 6647 of How. Stat. Some confusion has existed because, by introducing so many forms of one section, it has not always been easy to construe it in connection with the whole chapter on courts of chancery, but they have, by practical construction, been fairly harmonized. In 1887 this section was sought to be radically changed by converting a chancery hearing to something meant to resemble a trial at law, but confining this change mostly to jury trials, and not putting hearings without a jury on the footing of common-law trials without a jury. As this is the only section altered, and it is but part of a full system matured and simplified by the experience of considerably more than half a century, it is brought to our attention under two points of view:

1. As claimed to be so imperfect and incongruous as to be void for its deficiencies.
2. As invalid on broader constitutional grounds.

The former of these two questions seems proper to be glanced at first; and it makes it desirable to refer somewhat to the growth of the system.

As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administration in important particulars. The Constitution of the United States recognized the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by

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the Supreme Court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification. In *Carpentier v. Montgomery*, 13 Wall. 480, the importance of the distinction, and the impracticability of disregarding it, was somewhat explained in such a case as is now under consideration, as in several previous cases it had been held that the policy enjoined by Congress of securing as far as possible uniformity of practice between the state and United States courts could not be carried so far as to confound the legal and equitable jurisdictions. *U. S. v. Howland*, 4 Wheat. 115; *Boyle v. Zacharie*, 6 Pet. 658; *Robinson v. Campbell*, 3 Wheat. 222; *Livingston v. Story*, 9 Pet. 654; *Russell v. Southard*, 12 How. 139; *Neves v. Scott*, 13 Id. 268; *Boyce's Executors v. Grundy*, 3 Pet. 210; *Bodley v. Taylor*, 5 Cranch, 191. These and many other cases which might be cited show the general course of decision in the Supreme Court.

As Michigan received the common law free from any older statutory admixture, it naturally followed the English divisions of law and equity, and under the enlightened administration of Chancellors FARNSWORTH and MANNING the practice, which was largely shaped by legislation in accordance with their views, received the form which it now has, and our statutes embody in a very intelligible way a system so complete as to need very little aid from other sources.

So far as the statutes provide for the earlier stages of a cause, up to the preparation for hearing, this new statute does not interfere, except as to testimony, in which the change is radical, as it is also radical in regard to the mode and incident of the hearing and the preparations for appeal. And here occurs a series of difficulties requiring attention. As the law stood before, the testimony might be taken by deposition or in open court, and, upon specific issues of fact suitable for a jury, the aid of a jury might be invoked. But in all cases the testimony was secured and preserved for use on

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appeal, and in this Court each case was to be reheard on the whole testimony, and on that rehearing this Court was enabled and required to render its own decree, by simple affirmance if the decree below was satisfactory, and in other cases by such a change, partial or total, as would make the final disposition such as it should have been in the first place. But in all cases where the cause had proceeded to a hearing on facts, the law contemplated that this Court should make a final disposition on the merits and not remand it for a new trial or hearing on issues already once tried and decided. The sections of the statute which refer to the action of this Court in appellate cases remain unchanged, and are the only statutory method of bringing into this Court chancery appeals. As it is not competent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all the other State tribunals, no legislation which practically destroys it is valid.

The statute of 1887 (Laws of 1887, p. 358) undertakes to provide that—

"Either party shall also be entitled to the right to a jury, to be demanded in the same manner as in a suit at law, and the verdict of such jury on any question of fact shall have the same force and effect in the circuit [court] in chancery, and in the Supreme Court on appeal, as the verdict of a jury in an action at law.

"Whenever a jury is demanded as aforesaid, an issue or issues shall be framed under the direction of the court, if, in the opinion of the court, such issue shall be necessary to be submitted to such jury, and in all cases of trial in open court, whether with or without a jury, it shall be the duty of the court trying said cause to rule upon all questions of admissibility of testimony in the same manner and with the like effect as in a suit at law. * * * * * * *

"In case the cause shall have been tried by a jury on demand of either of the parties, either party shall in like manner be entitled to make and settle a case as provided in this section, and it shall not be necessary to set forth in such case all the testimony given upon such trial, but only so much thereof as may be necessary to a clear understanding of the questions of law arising therein. * * * Upon the case so

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made and filed, an appeal may be taken to the Supreme Court by any of the parties, as in ordinary chancery cases."

It requires but a little examination to discover that these changes cannot be carried into effect in practice, and are entirely in conflict with the rights of parties, as well as with the remainder of the retained chancery system. Merely formal defects could perhaps be corrected, but the defects are more than formal.

Apart from the serious question whether, under cover of amending one section of the Compiled Laws, the whole body of the laws can be revolutionized, it is very certain that laws passed for one purpose, and under one title or category, cannot be made to do duty under a foreign enactment, which was not in any way within their contemplated range. While the old law was adequate to secure the aid of jurors for advisory purposes, the case is different when an attempt is made to give a trial by jury which shall have the effect of a common-law inquest. The trial by jury in common-law cases is guarded by a large body of provisions designed to procure a fair and impartial jury, extending from the making of the jury-lists through the process of selecting and summoning regular jurors and talesmen to the completion of the panel through challenges and other tests. All of these provisions, whether statutory or not, belong to the machinery devised for the common-law courts, and cannot be adapted, without new and careful legislation, to anything else. But this new statute introduced other complications which are quite as serious.

When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all. Specific relief is generally required, and usually more or less of the defendants have conflicting interests to a greater or less extent, which require different issues and different treatment;

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and these difficulties frequently become known or developed during the course of the investigation.

This law, as probably would be almost unavoidable if the essentials of common-law practice are followed, is framed on the theory of single contesting parties. No one party or set of parties can be authorized to become directors of the suit, and determine in what manner it is to be tried, or select the jury to try it. It would be difficult, at least, to have a case in which several parties have several interests, which may, nevertheless, be more or less affected by what happens to the rest, decided partly by a jury and partly in some other way. Under the standing practice the only way to secure justice to all has been found to be to have the whole case heard at once, so that the same arbiter passes on all the varied interests, and adjusts them. Each has a right to have the whole of his case decided by one tribunal, and if a jury should find an issue in one way on one party's demand, and the court should find the same fact in another way, there could be no decision. So a jury might easily find a verdict which would have to be set aside for misdirection or improper dealings with testimony, and a second jury might find differently, and involve a new complication before the case is disposed of. The differences between law and equity issues create many more difficulties which need not be dwelt on, because the defects are still more radical.

When a case is tried by a common-law jury one verdict settles the whole issue, and, unless set aside, furnishes the complete basis of a judgment, which cannot in anything depart from it; and there is and can be no issue which the jury do not dispose of. The judgment follows as a matter of course, and, if taken to an appellate court, the verdict cannot be altered, and must stand completely good or completely bad. A verdict on part of the issues and a disagreement on the rest is no verdict. It is not possible to have one verdict in a suit in equity which shall decide the whole con-

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troversy, and, if it were, this law does not provide for it, and provides for nothing in its place. It makes no provision for a jury except on detached issues, unless, as is dimly suggested, the whole pleadings are laid before them, and, if that should be done, it would be impossible to frame a general verdict on which any decree could be entered. At law, in all but a few possessory cases, the verdict is for the recovery of a specific sum of money, or a specific thing, on which a single and simple judgment can be rendered. In equity there are few, if there are any, cases where specific relief is not required, and the adjustment of the conflicting or separate rights. If specific issues only are submitted to the jury, some part of the controversy must always be decided by the court, and in that case the division would make it impossible, by any known means, to have the case disposed of in an appellate court. And this suggests another difficulty which would in any event render this law inoperative.

The only method of review provided in the statutes is by an appeal, and that appeal is made as all appeals require it to be made, so as to lead to a review of the whole case, and a decision on the whole merits. The only conceivable purpose of this law is to make the verdict final on all that it covers. But the law forbids inserting in the case any more of the testimony than will explain the bearings of the rulings. If wrong rulings have been made, it contemplates their correction in some way. But if this is done the verdict must be set aside. This statute does not provide for taking or settling exceptions. It provides no method for having this Court decide on the rulings upon the admission or rejection of testimony, and it provides no means for supplying testimony which has been improperly ruled out, or for granting a new trial before the same or any other jury on the whole or any part of the case. It leaves the case subject to nothing but the appeal already provided for chancery decisions, and makes no provision whatever for either supplying omitted testimony,

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or for finding out what a jury would have done had there been no testimony improperly let in or shut out. It does not mean, as it could not lawfully mean, to prevent a review in this Court, and yet it provides no method for getting it in any sufficient way. And it is open to the incurable mischief of introducing changes in such a crude and contradictory manner that, while there are many defects patent to all observers, there are probably many more which would appear whenever any case actually arises in practice in the complicated controversies which the necessities of jurisprudence turned over to equity because common-law methods could not deal with them.

This leads to the inquiry whether it is competent for legislation to bring about any such radical change as is here attempted. We think it is not. The decisions of the United States Supreme Court before referred to do not bind state practice, but they nevertheless to some extent indicate the real difficulty. That tribunal did not decide that under the United States Constitution there could be no change in equitable procedure, because the whole body of chancery practice has been repeatedly amended and simplified by that Court. Their rulings mean neither more nor less than that there are various kinds of interests and controversies which cannot be left without equitable disposal without either destroying them or impairing their value. It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights. In rude times, when there is no business, and no variety of property rights, very simple remedies are sufficient. But where the ordinary remedies have become inadequate to deal with more extended or peculiar interests, such as multiply in all civilized countries, different methods and different tribunals become necessary. The universally recognized basis of equitable jurisprudence, found in statutes and constitutions, as well as

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in the reports and text-writers, is the inadequacy of the common law to deal with these subjects. A principal basis of that inadequacy was the nature of the tribunal passing on the facts. In common-law issues fact and law can be readily separated; but in the great majority of equity proceedings it is impossible to make any such separation. The functions of judges in equity cases in dealing with them is as well settled a part of the judicial power, and as necessary to its administration, as the functions of juries in common-law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they cannot foreclose him in his conclusions unless they convince his judgment.

The very wise provision of our Constitution, which by section 5 of article 6 directs the Legislature to abolish distinctions between law and equity proceedings, is carefully worded, and requires it to be done only as far as practicable. It does not blend legal and equitable interests, although no doubt it does favor the removal of such distinctions between those as are nominal, rather than real. The purpose of the Constitution has been very liberally carried out, and there is now hardly any distinction left that is merely formal. But the clause referred to was suggested, as all men know, by the then recent attempts in other states to abolish systems of procedure which had become overtechnical, and provide forms of rem-

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edy of a more simple character. In doing this the distinction in names between legal and equitable remedies was abolished. But it very soon became manifest to all jurists that the class of rights which, for want of a better definition, were loosely called "equitable," and which had only been included under that name because the common-law methods were not adapted to enforce them, differed from other rights in their essential nature, and not in form only, and that, by whatever name they were called, they could only be efficiently protected and made available by the means known as "equitable."

In all ages, and in all countries, this distinction by nature, which was never called "equitable" except in English jurisprudence, where it was first so called from an idea that the rights were imperfect because unknown in the rude ages, when property was scanty, and business almost unheard of in the regions outside of great cities, has been recognized and provided for by suitable methods substantially similar in character. Juries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying conditions. Theory amounts to nothing in the history of jurisprudence. The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore.

The case in which relator seeks our interference has never been heard by the court as it should have been, and a *mandamus* must be allowed to direct the circuit judge to rescind his decree, and allow the case to be brought to a hearing

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before the court for final disposal on pleadings, and on proofs to be properly taken.

The other Justices concurred.

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SABRA E. TREADWELL v. CHARLES E. PADDOCK.

Replevin—Waiver of return of property—Assessment of damages.

1. On an assessment of damages in a replevin suit, on waiver of a return of the property, the *true* condition of the title may be shown.

   So *held*, where a wife replevied property from an officer who had levied upon the same as belonging to her husband, and sought on such assessment to show her title to defeat the alleged *special* interest of the defendant.

2. On an assessment in a replevin suit, on a waiver of a return of the property, all questions concerning the amount recoverable by the defendant must be settled, which assessment becomes the conclusive measure of liability in a suit on the bond. *Ryan v. Akeley*, 42 Mich. 516.

Case made from Ingham. (Peck, J.) Argued June 6, 1889. Decided June 14, 1889.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Smith & York, for appellant.

E. D. Lewis, for defendant.

CAMPBELL, J. The record in this case shows that plaintiff replevied from defendant a wagon which defendant, as deputy-sheriff, had taken on an execution issued against plaintiff's husband. The property was taken on the writ of replevin and restored to plaintiff, but, by reason of a failure by the officer who served the writ to deliver a properly certi-

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fied copy to defendant, the case was dismissed, and judgment of discontinuance entered. Defendant waived a return, and claimed an assessment of damages. Upon the assessment plaintiff offered to show the condition of the title as belonging to her, so that the special interest claimed by defendant amounted to nothing, on account of the levy being made on property not belonging to the execution debtor. This the court below refused, and allowed judgment for the full value of the property in favor of the defendant officer. Plaintiff brings error.

As the only question in the case comes within former decisions of this Court, no full discussion is required.

Where judgment of discontinuance is rendered, the defendant has the choice of claiming a return, or waiving it and taking a personal judgment for the value of his interest. When a return is claimed it does not enlarge his actual right, or put him in any better position than if no replevin had been brought. If he had no valid claim, the return gives him none; and if, in this instance, he had become a trespasser by taking plaintiff's property to pay the debt of another person, he would have no claim against it. Accordingly it has been provided by statute that the true interest may be shown in case suit is brought on the replevin bond.[1] No greater interest can be gained by waiving a return.

In *Ryan v. Akeley*, 42 Mich. 516 (4 N. W. Rep. 207), the defendant, as in the present case, had waived a return and procured an assessment of damages. Upon suit on the bond the plaintiff in replevin sought to reopen the question of damages, and controvert the defendant's claim as unwarranted in fact; but it was held that all questions concerning the amount recoverable by defendant must be settled on the original assessment, which became the conclusive measure of liability. That case decides this. It has been recognized in

[1] How. Stat. § 8354.

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several later decisions, most of which were referred to on the argument.

Very frequently, as in the present case, the cause goes down for some informality for which the plaintiff is not to blame. The primary purpose of the action is to settle the possessory right, which does not necessarily involve more. But if the defendant chooses to change the primary issue into one of pecuniary interest, it would be grossly unjust, and the statute does not provide, that any more shall be awarded defendant than he is justly entitled to.

Plaintiff should have been allowed to show the facts insisted on.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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GEORGE W. BROWN v. MICHAEL QUINLAND AND ETTA QUINLAND.

Ejectment—Identity of grantor—Idem sonans—Selection of land under Indian treaty—Evidence.

1. The Indian names "Che-gaw-*ge*-quay" and "Che-gaw-*go*-quay" may be regarded as of the same sound.
2. Where under an Indian treaty the selections of land were in writing, oral testimony of such fact is incompetent, in the absence of a legal excuse for the non-production of the writing or of a certified copy.
3. In an action of ejectment involving the identity of the patentee, a witness, who cannot identify the land in dispute with that he was on when he had a conversation with the occupant as to who selected the latter parcel, cannot testify to such conversation, in the absence of evidence of the identity of the two parcels.

Error to Isabella. (Hart, J.) Argued January 11, 1889. Decided June 21, 1889.

Ejectment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

N. O. Griswold and *M. C. Palmer*, for appellant.

Fancher & Dodds Bros., for defendants.

CHAMPLIN, J. This is an action of ejectment to recover possession of the south-west quarter of the north-east quarter of section 33, township 15 north, range 4 west.

Both parties claim through a patent issued by the United States to an Indian woman by the name of Che-gaw-go-quay, dated May 27, 1871. The plaintiff had possession of this patent, and introduced it in evidence; also a deed purporting to have been executed by Che-gaw-ge-quay to Peter C. and Alexander Andre, dated May 7, 1872, recorded May 16,

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1872, and other conveyances by which he claims the title was vested in him.

Some question is made in the brief of defendants that the deed to the Andres was made by Che-gaw-*ge*-quay, and not by the grantee in the patent, the third syllable being spelled "ge" instead of "go." The deed is printed in the record, and while the name of the grantor in the body of the deed is spelled "Che-gaw-go-quay," the signature and the name of the party in the acknowedgment is spelled "Che-gaw-ge-quay." The grantor signed it with her mark, and we think it may be regarded as of the same sound.

The only errors assigned are upon the admission of testimony.

The only disputed fact was the identity of the persons who executed the deeds, as being the grantee named in the patent.

The plaintiff made a *prima facie* case, and rested. The defendants were permitted to introduce testimony tending to show that they obtained title from William N. Brown, John C. Leaton, and Sarah Gruett, and that Brown and Leaton obtained a deed from an Indian woman residing at Sarnia, Ontario, on the twenty-second day of May, 1883, known as "Che-gaw-go-quay," and that, at the time, she was sick and bed-ridden, and died eight days afterwards; that she had been bed-ridden from about the year 1866, and was not in Saginaw county, Michigan, in 1872,—the year and county in which the plaintiff's deed to the Andres purported to be executed; that this Indian woman was a sister of Charles H. Rodd, and that Charles Rodd was an Indian, and was employed for about twelve years as Indian interpreter to the government agent; that he died in 1867; that the first issue of patents for lands to Indians on the Isabella reservation was made in 1871.

A witness introduced in behalf of defendants was permitted to testify that in 1866 he was upon the 40 acres of land in question, and that Charles Rodd was then engaged in making

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sugar upon the same. On cross-examination he testified that he was not able to say that the sugar bush was on the south-west quarter of the north-east quarter of section 33, township 15 north, range 4 west, and that he was not able to identify the land as the land above described. He was permitted to testify that he asked Rodd if the land was his, and that he said "No;" he had made that selection for his sister, Che-gaw-go-quay.

The plaintiff's counsel moved to strike this testimony out, but the court overruled the motion. In this he erred. It was in evidence that the selections of land made by the Indians were in writing, but the writing was not produced, and no reason was given for not producing it or a certified copy, if it was material. There was no testimony showing that Che-gaw-go-quay was an orphan child at the time the selection was made, and there was no testimony showing that Charles Rodd had any authority whatever to make selection for his sister. If she was 21 years old, she was entitled to make her own selection. It was provided by treaty that, after selections were made as therein provided, the person entitled might take immediate possession of the land selected, and hold it until the patent should be issued by the United States. 11 U. S. Stat. at Large, 622, 633.

The effect of this testimony was very prejudicial. The object of the question was to show that Charles Rodd had made selection of that land for his sister, and that she was the Che-gaw-go-quay of Sarnia. It was incompetent testimony to prove selection.

If the selection had been proved by competent testimony, then the admissions or declarations of Rodd as to his possession, and the character of it, would perhaps have been competent evidence,—a point not now decided. But the whole testimony of the conversation between witness and Rodd should have been stricken out when the witness testified that he could not identify the land they were on at the time

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with the land in dispute, especially as no other testimony was introduced to show that the sugar bush was upon this land.

The case was tried upon the theory that the grantor of the Andres was not the same person as the grantor of Brown and Leaton; and it is upon that theory that the testimony is held to have been improperly admitted. If the grantor in each deed referred to were the same person, the testimony would have been immaterial, but its admission would have been harmless error.

There is testimony in the case which tends strongly to show that the grantor in both deeds was the same person. The testimony of the defendants tends to show that Che-gaw-go-quay was a sister of Charles Rodd; and the testimony introduced by the plaintiff tends to show that she was a relative of Rodd. The deed to Brown and Leaton was obtained by Phillip Gruett, who testifies that in 1879 he was employed by Brown and Leaton and others to look up defective titles, and in 1883 Jonas Henry told him that Che-gaw-go-quay had not sold this land; that previous to that he had never inquired for her, and had never known her; that he and Leaton went to Sarnia, and found Che-gaw-go-quay lying in bed and very helpless; that he told her that here was "a man that wants to buy your piece of land in Isabella county;" that she made no answer; that he asked her whether she had sold that piece of land, and she said she had sold one piece of land to a white man from Isabella; that he asked her who the man was, and if she knew Bennett, and she said she did not know the man by name any more; that he told her she had 80 acres of land there, and that this man wanted to buy that 40, and she said she would sell, and he told her Mr. Leaton offered her $1.50 an acre, and pay $10 down, and give her a paper stating that she should have the balance when this title was perfect. He says the land was worth, in

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his judgment, $250 or $300, and he don't remember that he told her what the land was worth.

Under the treaty each head of a family was entitled to select 80 acres of land, and each single person, over 21 years, 40 acres. There was no testimony in the case showing that Che-gaw-go-quay was the head of the family; on the contrary, the presumption arising from the fact that the United States only granted her a patent for 40 acres is that she was not. On what basis Gruett represented to her that she had 80 acres is not disclosed by the record; and, if she had but 40, she plainly told them that she had sold it to a white man from Isabella, from which a strong inference arises that she is the identical Che-gaw-go-quay that conveyed to the Andres.

The court also erred in permitting the witness Gruett to testify to the record made up by the Indian agent, which he had frequently seen and consulted in Arnold's office. It was irrelevant testimony.

The judgment must be reversed, with costs of both courts, and a new trial granted.

MORSE and CAMPBELL, JJ., concurred.

SHERWOOD, C. J. (*dissenting*). I do not take the same view of this case as do my brethren.

The plaintiff brings ejectment to recover the south-west quarter of the north-east quarter of section 33, in township No. 15 north, of range 4 west, claiming to be owner of the title in fee.

The verdict was in favor of the defendants at the circuit, and plaintiff asks review in this Court.

Both parties claim to have obtained their title from the same person, who was the patentee from the United States. The patentee was an Indian woman whose name was spelled in the patent "Che-gaw-go-quay."

The plaintiff claims through a conveyance made May 7, 1872, by an Indian woman, whose name is spelled "Che-gaw-ge-quay," to Peter C. and Alexander Andre, but neither this

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woman nor any grantee of hers ever took any possession of the premises.

The defendants' claim of title is based upon a deed executed by Che-gaw-go-quay to William N. Brown and John C. Leaton, dated May 22, 1883, conveying the land in question; and Brown and Leaton conveyed to the defendants, who took possession of the land, and have resided thereon ever since as their homestead. The plaintiff's deeds were all on record when Brown and Leaton made their purchase, and when the defendants purchased; and the only material question in the case was, was the Indian woman who conveyed to the Andres the person to whom the land was patented? If so, then the plaintiff was entitled to recover; if not, then the defendants, being in possession, should have prevailed.

Whether the plaintiff's grantor, Che-gaw-go-quay, was such patentee or not was a question of fact for the jury to pass upon; and, they having done so under a proper charge by the court, the question should be regarded as settled in favor of defendants.

I can discover no error in receiving the testimony, and the judgment should be affirmed.

LONG, J., did not sit.

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109	58
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CHARLES F. BUTTON v. ROBERT TRADER AND WILLIAM KULASZWICZ.

Vendor and vendee—Retention of title as security—Confirmation of sale—Garnishment—Negotiable paper.

1. A vendor who retains the title on a sale of personal property until paid for makes such sale *absolute* by electing to take judgment against his vendee for the unpaid purchase money.
2. A justice of the peace is not authorized to render judgment in a garnishee suit, based *solely* upon an answer admitting an indebtedness upon a note overdue at time of garnishment, and which third parties claim to be *bona fide* purchasers of, before maturity *and for value.*

Error to Gogebic. (Williams, J.) Argued April 5, 1889. Decided June 21, 1889.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

C. F. Button, in *pro. per.*, for appellant.

M. M. Riley, for defendants.

MORSE, J. This suit was commenced in justice's court upon the following promissory note:

"$150.00. BESSEMER, February 28, 1887.

"Twenty days after date we promise to pay to Fred Strub or order one hundred and fifty dollars, value received, at bank of Bessemer, Mich. ROBERT TRADER & Co."

It was indorsed on the back by the payee, Fred Strub.

The defendants constituted the firm of Robert Trader & Co.

The defendants pleaded the general issue, and gave notice of their defense under the same to be—

"1. That all the indebtedness of the defendants to plaint-

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iff on the matters in controversy was garnished before W. J. Haggerson, justice of the peace, at the suit of *Edward Donally v. Fred Strub*, and the money paid into the hands of said justice, and a discharge given defendants therefor.

"2. That said note was given by defendants to Strub for purchase money of personal property sold by Strub to said Trader & Co., and that the title to said personal property was not at the time of such sale in said Strub as he represented, and that said note was given without consideration, and void.

"3. That plaintiff is not a *bona fide* purchaser of said note for value and before due.

"4. That said plaintiff is an attorney and counselor at law, and purchased said note contrary to the laws of the State of Michigan, in such cases made and provided."

The defendants had judgment in justice's court, and, on appeal to the circuit court for the county of Gogebic, they again prevailed.

Upon the trial in that court the plaintiff introduced the note, and rested his case.

The defendants then gave evidence tending to show that, on or about the day the note was made, Robert Trader & Co. bought of Fred Strub a stock of meats and a meat-market outfit. Strub was then in possession and claimed to own the whole of the property. They paid him $300, the note in suit being part of said payment.

Possession of the property was given to the defendants, but afterwards they were notified by one Edward Donally that he was the owner of one-half of the same. Donally brought suit against Strub, and made Robert Trader & Co. garnishee defendants. They paid the amount of the note in suit to Donally, who threatened to take the property if they did not do so, and after such payment Donally recognized defendants as the sole owners of the property.

It appeared from the testimony of Donally, who was sworn as a witness on behalf of the defendants, that, before the sale by Strub to defendants, he had sold his half interest to Strub, but upon condition that the title should remain in

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Donally until he was paid for such half. When Strub sold to defendants he owed Donally $150 on the goods.

Donally commenced suit in justice's court against Strub, March 21, 1887. On the same day summons in garnishment was issued against Howell & Riley, in whose hands Trader & Co. had placed the money to pay this note. Donally recovered judgment against Strub, March 30, 1887, for $300. This judgment was never appealed from, and is in force.

The garnishee proceedings against Howell & Riley were not pressed, and they paid the money in their hands back to Trader & Co.

April 7, 1887, Trader & Co. were garnished in the same suit by Donally. On the return day Trader & Co. answered, and soon thereafter paid the amount of the note to the justice before whom the suit against Strub and the garnishment proceedings were commenced, who paid the same to Donally.

The garnishee proceedings were not relied upon by the defendants at the trial in the circuit, and the circuit judge put the case to the jury upon two propositions:

1. To find whether or not Strub owned the whole of the property at the time he sold it to the defendants. If he did, then the plaintiff should recover.
2. If they found that the title was to remain in Donally of one-half of the property until it was paid for, and it had not been paid for by Strub as testified by Donally, then the plaintiff could not recover, unless he showed that he was a *bona fide* purchaser of the note for value, and before due.

As to the second proposition there was a conflict in the evidence.

The plaintiff insisted in the court below, and this is his point here, that when Donally sued Strub for the amount due him on the purchase price of his half interest, and garnished the money set apart by Trader & Co. to pay this note, and subsequently garnished Trader & Co., the defendants in this

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suit, for the purpose of holding the money owing by them to Strub upon his sale to them and on the note in this suit, he (Donally) affirmed the sale by Strub to the defendants, and never afterwards could repudiate it; and that, therefore, it made no difference whether plaintiff had notice, before he bought the note, of Donally's claim or not, and a verdict should have been directed for the plaintiff for the full amount of the note and interest.

We think the plaintiff is right. Donally, when he found the property passed by Strub as his own to the defendants, if his claim as testified to by him was correct, had two courses open to him to pursue.

He could have taken measures to recover his property of the defendants, or he could have affirmed the sale of Strub to them, and looked to Strub for the value of his property.

He chose the latter course. He elected to pursue his remedy against Strub, and now has a judgment against him, not only for the full amount of his interest in the property, but for all that Strub then owed him on any account. Having thus elected to confirm the sale of the property by Strub to the defendants, and having recovered a judgment for the value of his interest in the same against Strub, which is now in force, the property was thereby secured in the defendants, and the consideration for the note became a good one. Having elected to place his remedy against Strub, he cannot now turn round, repudiate such election, and maintain a claim to the property. *Thompson v. Howard*, 31 Mich. 309; *Nield v. Burton*, 49 Id. 53 (12 N. W. Rep. 906); *Wetmore v. McDougall*, 32 Id. 276; *Dunks v. Fuller*, Id. 242; *Farwell v. Myers*, 59 Id. 179, 183 (26 N. W. Rep. 328).

The payment by the defendants of the amount of this note to Donally was a voluntary one, and cannot help them any in this case.

On the return-day of the garnishee summons, Robert Trader, one of the defendants, appeared and answered,

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but his answer was such that the justice would not have been authorized in rendering a judgment against them upon it. Trader answered that the defendants were owing upon this note to Strub, but that the note was overdue at the time of the garnishment, and—

"That the firm of Button & Scanlin, attorneys at Bessemer, Mich., claim to have an assignment of said note, and that they purchased the same for value and in good faith before due, and claim the money thereon."

Without any further or other proceedings than this answer, they paid the money to the justice, who paid it to Donally,

The jury, under the facts as shown upon the trial in the court below, should have been directed to find a verdict for the plaintiff.

The judgment must be reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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GEORGE H. ANDERSON v. SAMUEL F. SCOTT ET AL.

Deed—Reservation—Description.

The opinion in this case involves questions of fact *purely.*

Error to Allegan. (Arnold, J.) Argued April 10, 1889. Decided June 21, 1889.

Trespass. Defendants bring error. Affirmed. The facts are stated in the opinion.

Jacob V. Rogers, for appellants.

Ed. J. Anderson, for plaintiff.

MORSE, J. This is an action of trespass growing out of a contest over the title to a small parcel of land in the village of Plainwell, Allegan county.

The suit was commenced in justice's court, and certified to the circuit court for that county, on a plea of title in the defendant Samuel F. Scott.

Hon. Dan J. Arnold, the circuit judge, before whom it was tried without a jury, upon findings of fact and law, rendered a judgment in favor of the plaintiff.

The map found on the following page shows the location of the premises in dispute, and the lines of reservation as claimed by the parties.

The facts found, and here deemed necessary for a solution of the difficulty between the parties, are as follows:

Two plats were introduced in evidence, one known as the "Corporation Plat of the Village of Plainwell," and the other as "Anderson's Addition to the Village of Plainwell." Lot 124, as shown on the map, and according to both plats, is a lot nine rods east and west, by six rods north and south,

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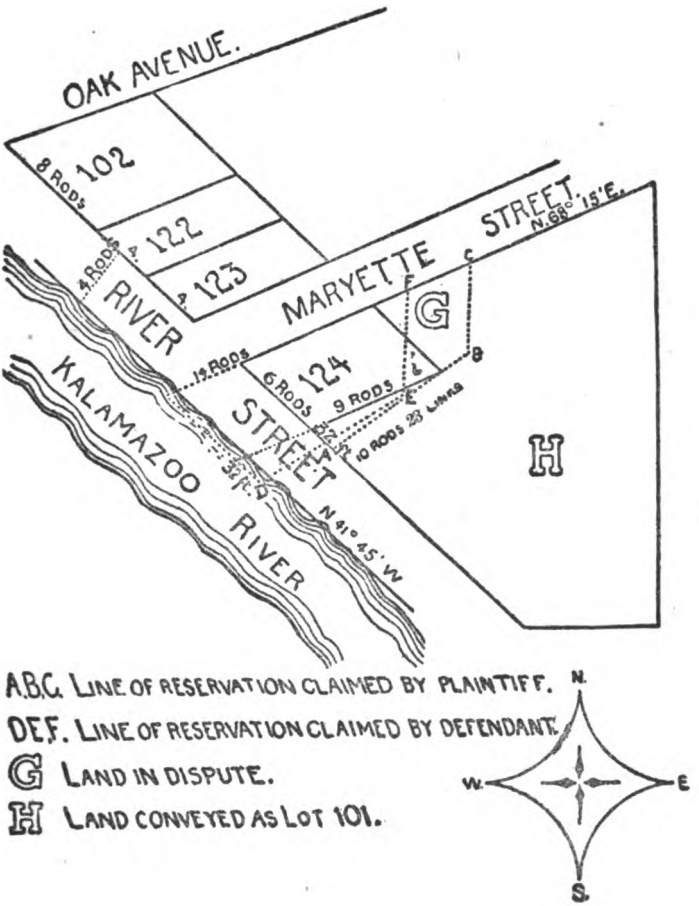

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bounded on the westerly end by River street, and on the northerly side by Maryette street.

River street, as platted on the corporation plat, extends in width from the westerly line of said lot 124 to the bank of the Kalamazoo river, as it then flowed,—a distance of some thing over three rods. Owing to diversion since of a large part of the waters of the Kalamazoo at a point up the stream from lot 124, the waters of the river opposite said lot have receded, leaving a considerable space of dry land between th original and present easterly limit of the flow of water in said stream.

At the time of the alleged trespass the plaintiff was the owner and in possession of lot 124, and was also in possession of the disputed parcel of land.

It is conceded that he owns this disputed strip, if it is contained and embraced within a reservation made in a certain deed from him to the defendant Samuel F. Scott. If not within the reservation, then it passed in this deed to Scott, and the title is in him.

This deed was executed on the twenty-seventh day of June, 1879. By such deed the plaintiff conveyed to said Samuel F. Scott—

"All that certain piece or parcel of land situate and being in the village of Plainwell, county of Allegan, and State of Michigan, known and described as follows, to wit: Lot No. one hundred and one (101), as recorded in the corporation plat of said village of Plainwell, excepting and reserving therefrom a piece of land described as follows, to wit: Commencing at the south-west corner of lot 124 of said plat; thence in a south-easterly direction, along River street, 32 feet; thence in a north-easterly direction, *on a line* with the *south-east corner* of said lot No. 124, 10 rods and 23 links; thence north, to *Oak avenue* (?); thence west, to the north-east corner of said lot No. 124; thence, in a south-easterly direction, to the *south-east corner* of said lot 124; thence, in a direct line, to the place of beginning."

It is admitted by both parties that there was a mistake in

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the drafting of this deed; that lot 101 was not intended to be conveyed at all, but the land intended to be embraced in the description "Lot 101" was in fact the lot marked "H" on the map; and the street named in the deed as "Oak Avenue" was intended to mean "Maryette Street."

The plaintiff claims the starting line of this reservation to be at the south-west corner of the lot, as shown on the map, where the corner touches the easterly line of River street. Starting at this point, as shown by the dotted line A, B, C, the reservation runs 32 feet south-easterly, along the east line of River street; thence running north-easterly 10 rods and 23 links, "*on a line*" with the south-east corner of lot 124, it passes through said corner, and beyond it; then the line runs to Maryette street; thence west, on the line of Maryette street, to the north-east corner of lot 124; thence, along the line of said lot, to the south-east corner of lot 124; thence, along the southerly line of the same lot, to the place of beginning.

This seems to be a reasonable description, and the land reserved is all found outside of lot No. 124, and within the original boundaries of the lot marked "H" on the map, out of which the reservation was intended to be made.

The defendants claim that the western boundary of lot 124 is the Kalamazoo river. The first argument is that lot 124 being bounded on the west on the plat by River street, which is bounded by the Kalamazoo river, the title of the lot-owner, the plaintiff, in fee runs to the river, burdened with the easement of the street. The second argument is that by the deeds from plaintiff's grantors of the land, labeled "Lot 124" on the corporation plat, which was conveyed by metes and bounds, the westerly line of the same, as described in said deeds, was the Kalamazoo river.

The defendants, therefore, take their starting point of the description of this reservation at the point where the south-

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westerly corner of lot 124 would be if extended, as by the dotted line on the map, to the Kalamazoo river.

Commencing at such a point the line would run 32 feet south-easterly along River street, but on the westerly line thereof; thence running 10 rods and 23 links in a north-easterly direction, "*on a line*" with the south-east corner of lot 124, it would strike the line of said lot before it came to the corner, as shown by the dotted lines D, E, F, on the map. From thence to Maryette street the line must pass onto and across lot 124, coming out again into lot H before it reaches Maryette street; then running the line along Maryette street, to the north-east corner of lot 124, and from thence to the south-east corner of the same lot, following the description in the reservation, and a piece of land in the south-east corner, marked "i" on the map, is cut off and reserved out of something to which it did not belong.

It is, as can readily be seen by examining this map, and following the two claimed lines of reservation thereon, unnecessary to enter upon any discussion of the argument of the defendants on either of the two grounds advanced by them. It is plain that the description of this reservation was intended to start from the south-west corner of lot 124 as claimed by plaintiff. A comparison of the whole description with the lines claimed by the respective parties shows this starting point to be the only reasonable and intelligent one.

The judgment of the court below was correct, and will be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ALVIRA BLOOMINGDALE v. LEONARD CHITTENDEN.

Replevin—Affidavit—Failure of affiant to sign—New bond—Waiver—Bill of sale by married woman.

1. An affidavit in replevin, describing the plaintiff as affiant, and to which the usual jurat, signed by the justice in his official character, is attached, is not *fatally* defective because not *signed* by such affiant.
2. A defendant in replevin waives the statutory provision for judgment in his favor, on failure of the plaintiff to *forthwith* file a new bond where the original one is defective, by going to trial on the merits without raising such objection.
3. Where a married woman included in a bill of sale of property belonging to her husband certain of her own property, under the mistaken idea of thus protecting it from her husband's creditors, which fact was known to the vendee, who paid no consideration for said property, she can recover the same, after demand and refusal, in an action of replevin.

Case made from Ionia. (Smith, J.) Argued April 11, 1889. Decided June 21, 1889.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

C. H. Gleason, for appellant.

Frank A. Rodgers, for plaintiff.

CHAMPLIN, J. The plaintiff commenced an action of replevin before a justice of the peace.

The parties appeared before the justice, when the plaintiff declared orally in replevin for the goods and chattels mentioned in the affidavit and writ.

The defendant pleaded the general issue, and then objected to the jurisdiction of the justice upon two grounds:

1. Because the bond was not in a penalty of double the

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amount or value of the property sworn to, and the sureties had not justified their pecuniary responsibility as such to a bond such as the statute requires.

2. Because the affidavit was not subscribed by the party making it.

The court overruled the second objection, and allowed the plaintiff to file an amended bond on or before the day of adjournment. Then, on motion of defendant, the justice adjourned the cause.

On the adjourned day the suit was called, and the parties appeared by their attorneys. The amended bond was filed. The defendant's attorney made objection for the reason that the bond was not filed at the time the other was declared insufficient, and also that the sureties have not justified their responsibility as provided by the statute. These objections were overruled by the court, and the parties went to trial; and, after hearing the evidence of both parties, the justice announced that on Saturday, the twenty-second day of May, at one of the clock in the afternoon, he would render judgment. At the time mentioned he called the suit, and rendered judgment for the plaintiff. He then held the suit open one hour, the plaintiff not appearing, and defendant appearing. After waiting one hour, the defendant moved for nonsuit or discontinuance of suit, and the justice thereupon entered a judgment of nonsuit with costs, and for a return of the property, and the defendant appealed the cause to the circuit court.

The parties went to trial in the circuit court before the court without a jury, and after the testimony had been introduced, and while the defendant was making his argument, he, for the first time, raised the question that the justice had acquired no jurisdiction, because there was no proper affidavit.

The court filed a written finding of facts and of law, and rendered judgment for the plaintiff.

The office of the affidavit is to confer jurisdiction (*Elliott*

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v. Whitmore, 5 Mich. 537); and, if that is sufficient, the court will obtain jurisdiction over the process. The affidavit was not fatally defective because it was not subscribed by the plaintiff. It commences by saying: "Alvira Bloomingdale, being duly sworn, does depose and say;" and the justice attached his jurat, in which he certifies that the affidavit was "subscribed and sworn to before me the thirtieth day of April, A. D. 1886," which certificate he subscribed in his official character. The affidavit, with the jurat attached, shows that it was made by Alvira Bloomingdale, and is a sufficient compliance with the statute. *People v. Simondson*, 25 Mich. 113; *Merrick v. Mayhue*, 40 Id. 199, 200.

The bond is required for the protection of the defendant; and, although the statute[1] is peremptory that, unless the new bond is filed *forthwith*, the writ shall be dismissed on motion, and the property returned to defendant, it may be waived by the defendant, and must be regarded in this case as having been waived by going to trial before the justice upon the merits; and again in the circuit, without objection on this ground.

It appears, from the judge's finding of facts, that the plaintiff, being the owner of the property replevied, included it in a bill of sale to defendant with certain property of her husband, under the idea that, by so doing, she would protect it from being seized or taken by her husband's creditors to satisfy their debts; that defendant knew that such was the object; that she never intended to transfer the title to defendant, and he did not understand that he was to become the owner, and no consideration passed from defendant to plaintiff for said property, that she demanded the property before bringing suit, and he refused to surrender the same; that she signed the bills of sale voluntarily, and with full knowledge of their contents.

Counsel for defendant insists that, the bill of sale having

[1] How. Stat. § 6856.

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been executed voluntarily, she is estopped from setting up property in herself contrary to its terms.

Ordinarily, this would be so; but the facts show that she was laboring under a mistake of law at the time she executed the bill of sale, and the intent was not to pass the title to defendant. Her husband's creditors had no claim upon his wife's property, and could enforce none. She defrauded no one by the transaction, and there is no public policy or good morals which will be promoted by refusing to restore the property to her.

If the defendant supposed that creditors of her husband could reach it, there was a mutual mistake. If he did know they could not, and was aware she thought they could, it was a fraud upon his part not to inform her of her error. He parted with no consideration for the property, and should have surrendered it on demand.

The judgment of the circuit court is affirmed, and judgment will, upon motion being made, be rendered against the the sureties in the appeal bond.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JOHN F. WHENTING v. JOHN TORRENT.

Contract—Submission to jury.

Held, that the controversy in this case resolved itself into a question of veracity and the weight the jury should give to the conflicting testimony, and that the questions of fact were submitted to the jury, who were correctly instructed as to the law.

Error to Muskegon. (Dickerman, J.) Argued April 11, 1889. Decided June 21, 1889.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

DeLong & O'Hara, for plaintiff.

CHAMPLIN, J. The plaintiff is a mason and contractor engaged in the business of building.

In the fall of 1887 the defendant contemplated the erection of a building at the corner of Clay avenue and Second street, in the city of Muskegon, and had plans and specifications prepared. He had received several bids for doing the work, and among others one from the plaintiff, which was in writing, as follows:

"MUSKEGON, MICHIGAN, October 4, 1887.

"MR. JOHN TORRENT,—

"*Sir:* I, the undersigned, am willing to do the work of the club building, without furnishing any materials, for the sum of $5.25 per cord for laying the stone, and, with the mortar, $6.50.

"Yours, etc.,

"JOHN F. WHENTING."

The proposition for laying the stone at $5.25 per cord was accepted by defendant.

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It was claimed on the part of the plaintiff that he was told by defendant when he made the bid there would be from 10 to 12 inches of sand to be removed in order to lay the foundation, and that he told defendant if there was no more than that he would take it out and charge nothing; that afterwards there was a change in the plan, by which the foundation was lowered or sunk a foot deeper than originally intended; that he said to defendant that he would have to take the dirt out, and he hired one John Salter, who drew out some three hundred yards, and then stopped hauling, and when he did so the plaintiff commenced work, and laid what wall he could without removing any sand.

That one Wood was there superintending the job for defendant, and that defendant told plaintiff to do as Wood said; that he notified Wood that the sand must be removed, and Wood replied,—

"Well, if it is too much in the way, hire two or three men and charge it up to Mr. Torrent."

That plaintiff then hired men, and set them at work shoveling and moving the sand; that they were employed 67½ days, at $2, which he charged to defendant. There was also extra work in laying area walls and abutments.

Defendant denied the conversation about the removal of the sand, and claimed it was a well-known custom that, when a job was let to lay up walls for a building, the contractor must take the excavation as he finds it and put the wall in.

He denied that Wood had any authority to bind him by anything he might have said to plaintiff about removing the sand, and claimed that he was merely employed to see that the work was done according to contract. He denied that there had been any change with reference to putting the foundation deeper. He denied telling plaintiff to obey Wood's instructions.

It seems to me that the whole controversy resolved itself

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into a question of veracity and the weight the jury should give to the conflicting testimony.

The exceptions are based upon the refusal of the court to charge as requested by counsel for defendant, and to the charge as given. We have examined the errors assigned with care, and we do not perceive that any error was committed by the court in relation thereto. He submitted the questions of fact to the jury, and instructed them correctly as to the law.

The judgment must be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

DENNIS BURKE v. THOMAS CLIXBY.

Deed—Bill to correct description—Boundary.

The only question in dispute in this case was the location of a boundary line, and the decree of the court below fixing it is affirmed.

Appeal from Wayne. (Hosmer, J.) Argued April 12, 1889. Decided June 21, 1889.

Bill filed to correct the description in a deed. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Palmer & Palmer, for complainant.

James H. Pound, for defendant.

CHAMPLIN, J. The bill is filed to correct the description in a deed executed about the eighth day of February, 1877.

Burke and Clixby had for several years prior to 1877 been in partnership in the manufacture and sale of brick. They

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had purchased and jointly owned lots 10 and 11 of part of private claim No. 719, platted into lots by Colin Campbell in 1866 as part of the estate of Edward Martin. On the westerly side of the plat, extending past the lots in question, is a right of way 30 feet wide. Lots 10 and 11 are each marked upon the plat as containing five acres, the exterior lines being marked as 440.22 feet by 495 feet. There can be no doubt but that the right of way is included in the area of the lots.

The township authorities, after the platting, laid a highway along the westerly side of the plat 66 feet in width, the center line whereof was the westerly boundary line of the plat, which road is known and called the "Martin Road."

The parties carried on their partnership business on lots 10 and 11, and had erected buildings and sheds thereon. Mr. Burke occupied a house located on lots 10 and 11. Upon the dissolution the firm were unable to agree upon a division of the clay-beds and other property, and they amicably agreed upon Messrs. John Greusel and Conrad Clippert to make a division for them. Upon looking the matter up they found that Mr. Burke had put into the partnership more money than Mr. Clixby had, and, to compensate him for that, they awarded and the parties agreed that Mr. Clixby should give to Mr. Burke a deed of an undivided acre of land where Mr. Burke's house stood. They measured from the southerly line of lot 11 northerly, along the east line of the Martin road, 411 feet, and stuck a stake in the easterly side of the road as a starting point, and the acre was to be 130 feet wide, and extend far enough northerly along the easterly side of the Martin road to make one acre of land.

Burke immediately caused a survey of the acre tract to be made, and the surveyor employed furnished a description, as follows, viz.:

"Beginning at a stake standing in the easterly line of the Martin road (so called), 411 feet from the southerly line of lot number eleven (11), of the north-east part of private

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claim number 719, according to the recorded plat thereof in the register of deeds' office for the county of Wayne, in Liber 1 of Plats, page 163, on a course of north, 31 degrees west; thence along the easterly line of the Martin road north, 31 degrees west, three hundred and thirty-five feet, to a stake; thence north, 59 degrees east, one hundred and thirty feet, to a stake; thence south, 31 degrees east, three hundred and thirty-five feet, to a stake; thence south, 59 degrees west, one hundred and thirty feet, to the place of beginning."

He then caused to be prepared a warranty deed, intending to embrace therein the above description, but the scrivener by mistake omitted the north and east courses and distances, and said deed contained the following description:

"Beginning at a stake standing in the eastern line of the Martin road (so called), four hundred and eleven (411) feet from the southern line of lot number eleven (11) of the north-east part of private claim number 719, according to the recorded plat thereof in the registry of deeds for the county of Wayne, in Liber 1 of Plats, page 163, on a course of north, 31 degrees west (and being 33 feet east of the western line of said lot 11); thence along the eastern line of the Martin road north, 31 degrees west, 335 feet, to a stake; thence south, 59 degrees west, 130 feet, to the place of beginning, containing one acre."

The deed was executed on the eighth of February, 1877, by defendant, Clixby, and wife, and delivered to complainant.

The lot was staked out by the survey, and has been fenced and occupied by complainant and his grantees ever since.

The mistake was not discovered until a short time before the bill was filed. The defendant was requested to execute another deed to correct the mistake, and he refused to execute a deed making the west boundary the east line of the Martin road, but signified his willingness to execute a deed of one acre, making the center line of the Martin road the west boundary.

The only dispute between the parties is whether the west boundary of the acre should be the west line of the plat,

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which is the center of the Martin road, or the east line of the Martin road.

The court below decreed that the east line of the Martin road was the correct line, according to the agreement and intent of the parties, and we are satisfied beyond a doubt that the circuit court was correct.

The decree of the circuit court must be affirmed, with costs of this Court.

MORSE and CAMPBELL, JJ., concurred. SHERWOOD, C. J., and LONG, J., did not sit.

CHARLES C. MERRITT AND ROBERT D. MERRITT, EXECUTORS, ETC., v. ARTHUR B. KEELER, IMPLEADED WITH BYRON E. MERRITT.

Pleading—Declaration—Action by executors.

In a suit by executors, the declaration must aver the promise to have been made to their testator in his life-time to admit proof of that fact. *Barnum v. Stone*, 27 Mich. 332.

Error to St. Joseph. (Loveridge, J.) Argued April 12, 1889. Decided June 21, 1889.

Assumpsit by executors. Defendant Keeler brings error. Reversed. The facts are stated in the opinion.

Howell, Carr & Barnard, for appellant.

F. W. Knowlen and *Dallas Boudeman*, for plaintiffs.

CHAMPLIN, J. Suit was commenced by summons by plaintiffs against Arthur B. Keeler and Byron E. Merritt;

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and afterwards a declaration was filed in the cause, in which the plaintiffs styled themselves—

"As executors of the last will and testament of William R. Merritt, deceas.d."

It contained only the common counts in assumpsit, in which the promises are alleged to have been made to the plaintiffs.

A bill of particulars was filed containing several items, without stating any year. The first item reads as follows:

"March 8. To collection money, Geo. Mathias note, $5.00."

The other items are the same, except as to date and person, and except that opposite some of them, instead of "note," the abbreviation "acct." is placed. There are also two items for rent of store.

On the trial the plaintiffs were permitted, against the objection of counsel for defendant Keeler (the other defendant making no defense), to prove that the defendants were copartners, and had collected money for the plaintiffs' testator during his life-time, and used the same in their business, and this action was brought to recover the amount, besides some rent due from the partnership to the plaintiffs' testator during his life-time. No proof was introduced, or claim made, that defendants had ever promised to pay the executors after their appointment.

The declaration, as drawn, will not permit evidence of a promise express or implied, made to the testator in his life-time, as a ground of recovery.

It was competent for the plaintiffs to sue in their representative character, as they have done, but they must allege the promise to have been made to the testator in his life-time to admit proof of that fact. *Barnum v. Stone*, 27 Mich. 332.

As this disposes of the case as the declaration now stands,

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it will not be necessary to notice the several other grounds of error alleged.

The judgment must be reversed, and a new trial granted, with costs of both courts.

The other Justices concurred.

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JOSIAH E. HARDING v. JOHN C. BADER AND DANIEL DOUGLASS.

Taxes—Township board—Voting money for township expenses—Agricultural societies.

1. A township board is a body of *special* and *limited* jurisdiction, which must appear upon the face of their records. *People v. Supervisor of Blackman*, 14 Mich. 336.
2. The authority of a township board to vote money for township expenses depends upon the *neglect* or *refusal* of the qualified electors to vote the sums necessary to defray the *ordinary* township expenses at the *annual* township meeting; which neglect or refusal must be shown by the record of the board, and also that the sum voted is for *ordinary* township expenses.
3. In order to authorize a township board to vote money at a special meeting, to be raised by taxation, the record must show that all of the four members were notified of or were present at such meeting.
4. The adoption by a board of supervisors of the report of its committee on agriculture, recommending the appropriation of $800 to a county agricultural society, and of its finance committee, including in its schedule of sums to be raised by taxation "agriculture, $800," will authorize the raising of said sum as a part of the county tax, if the proper certificate is filed.

Error to Allegan. (Arnold, J.) Argued April 12, 1889. Decided June 21, 1889.

Ejectment. Defendants bring error. Reversed. The facts are stated in the opinion.

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Thomas A. Wilson, for appellants.

Silas Stafford, for plaintiff.

CHAMPLIN, J. Harding recovered below in an action of ejectment against defendants.

His claim of title as sustained on the trial was based upon two deeds executed by the Auditor General, and delivered to the plaintiff; one for the sale of the land in question for the taxes of 1875, and the other for the year 1878.

Bader was in possession at the time the suit was brought by Douglass, as his tenant, claiming title in fee, through title derived from the United States.

The land is situated in the township of Wayland, Allegan county.

At the annual township meeting held on the fifth of April in the year 1875, $175 was voted to be raised for incidental expenses for the current year, which vote was entered upon the records of such meeting.

The record of the proceedings of the township board of Wayland, held September 13, 1875, states that the said township board met pursuant to call of the supervisor and was organized, with Nash, supervisor, Stockdale, justice of the peace, and Hoyt, clerk of said township, all present; and that,—

"On motion of David Stockdale, the supervisor was authorized to spread $125, in addition to the sum voted at the last township meeting of the township, for township expenses."

There was no express statement in the record that the township board found that the electors neglected or refused to vote a sufficient sum for such expenses at the annual township meeting, and no express statement that the sum so voted by the electors was insufficient to meet the township expenses for the then current year.

The statute empowers the inhabitants of each township,—

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"At any legal meeting, by a vote of the qualified electors thereof, to grant and vote sums of money, not exceeding such amounts as are or may be limited by law, as they shall deem necessary for defraying all proper charges and expenses arising in the township." How. Stat. § 671.

It is made the duty of the township clerk to—

"Transcribe, in the book of records of his township, the minutes of the proceedings of every township meeting held therein." How. Stat. § 740.

He is also the clerk of the township board, and is required to keep a true record of all their proceedings. How. Stat. § 748.

The township board is required, at their annual meeting on Tuesday next preceding the annual township meeting, to examine and audit all accounts of the treasurer and other township officers, and also all claims against the township. All accounts audited by the board must be filed and preserved by the township clerk, and produced at the next annual meeting, which takes place on the succeeding Monday. How. Stat. §§ 746, 747, 749.

It is also provided, by section 750,—

"That whenever the qualified electors of any township, at the annual township meeting, shall neglect or refuse to vote such sum or sums of money as may be necessary to defray the ordinary township expenses, the township board of any such township is hereby authorized, at any regular meeting, to vote such sum or sums as may be necessary for that purpose, not exceeding such amounts as are or may be limited by law."[1]

Under the foregoing facts, and the statutes above cited, the circuit judge found, as matter of law, that there was no presumption that the township board voted this tax without authority; that there was no showing that this additional sum was not in fact necessary to defray the ordinary expenses of the township for the then current year; that there is no

[1] Act No. 60, Laws of 1887, limits the amount to one thousand dollars.

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statute requiring the township board to expressly determine of record the sum voted by the electors to be insufficient, or that an additional sum is required for that purpose; that the record implies the township board found an additional sum to be necessary, and voted to raise such sum; that it was in fact a regular meeting, it being called by the supervisor, and all the members of the board were present; that the action of the township board was sufficient in fact and in law to authorize the sum of $125, in addition to the sum of $175 voted at the annual township meeting, for contingent or township expenses to be spread upon the assessment roll.

I do not consider that the conclusions of law above stated follow from the facts found by the circuit judge.

The township board, as has been held by this Court, is a body of special and limited jurisdiction. *People v. Supervisor of Blackman*, 14 Mich. 336. The rules applicable to agencies of circumscribed, limited, and special authority must be applied to the proceedings had by township boards. One of these is that it must appear upon the face of their records that they had jurisdiction to act in the matter which is called in question.

The township board is not authorized by law to vote such sum or sums of money as they shall deem best for township expenses, nor are they authorized to vote money to defray township expenses at their pleasure. Their authority to act, under section 750, depends upon the neglect or refusal of the qualified voters at the annual township meeting to vote such sum or sums as may be necessary to defray the ordinary township expenses. The record must show the neglect or refusal of the voters at the annual meeting, and it must also show that the sum voted by the township board was for *ordinary* township expenses.

The law places the right of voting money, to be raised by taxation to defray township expenses, in the majority of the qualified electors, to be exercised on the annual township

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meeting. The law provides for placing before the electors the sums necessary to be raised for the ordinary expenses of the township. How. Stat. §§ 749, 1800, 1801. And it also provides that, in case they shall neglect or refuse to vote the sums necessary, then the township board may do so.

The record of the township board did not show that the voters at the annual meeting neglected or refused to vote the sum or sums necessary to defray the ordinary expenses of the township, nor did it show that the sum voted by the township board was for ordinary expenses. On the contrary, the records of the township meeting showed that the qualified voters did provide and vote $175 for township expenses; and, for anything that appears from the records, it was sufficient to defray the ordinary expenses of the township for the current year.

There is no presumption that the voters at the annual township meeting did not vote a sufficient sum to defray the township expenses. The presumption is just as strong that they did, in support of the action of the voters, as that they did not, in support of the action of the township board. When the records are in evidence, they must speak for themselves, and are not aided by any presumption of right official action which the records do not contain that is essential to the validity of the proceedings. *Dickison v. Reynolds*, 48 Mich. 158 (12 N. W. Rep. 24); *Boyce v. Sebring*, 66 Id. 210 (33 N. W. Rep. 815). The additional sum of $125 voted by the township board was unauthorized, and rendered the tax deed for 1875 void.

The action of the township board was invalid for another reason. The board consists of the supervisor, two justices of the peace whose term of office will soonest expire, and the township clerk, any three of whom shall constitute a quorum for the transaction of business. How. Stat. § 744.

The statute provides that the board can vote to raise money for township expenses, at regular meetings. It does not pre-

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scribe when regular meetings shall be held, but that is left to be regulated by the board, as its standing rules or orders may provide. The records do not show that the action of the board was had at a regular meeting; on the contrary, they do show that it was at a called or special meeting; in which case, the records must show that all of the members were notified, or were present at the meeting. The record of the meeting of the township board held on Sept. 13, 1875, shows that only three members were present, namely, the supervisor, one justice of the peace, and the township clerk, and does not show that the other justice was notified. A board thus convened would have no authority to vote money to be raised by taxation upon the township. 1 Dill. Mun. Corp. (3d ed.) §§ 262, 263, 286.

The nineteenth finding of fact and law is as follows:

"The record of the proceedings of the board of supervisors, at their October session in 1875, was put in evidence, and shows that on October 15, of said session, the committee of said board upon agriculture made its report. Among other matters contained in said report is the following recommendation, viz.:

"'That there be appropriated by the board the sum of $300, to be raised by tax this year, to be appropriated as follows: $220 to the Allegan County Agricultural Society, and $80 to the Union Agricultural Society.'

"This report was on motion amended, so as to give the entire amount of $300 to the Allegan County Agricultural Society; and the report, so amended, was accepted and adopted by said board.

"On the same day the committee of said board on finance made its report, and therein recommended the raising by tax upon the taxable property of the county of Allegan, and to be spread upon the assessment rolls for 1875, several sums for different county purposes, amounting in the aggregate to $33,500; and among the items so recommended is this: 'Agriculture, $300.' This report was, on the same day, accepted and unanimously adopted by the said board, and the total amount, $33,500, and no more, was duly apportioned among the several townships in the county; and the

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sum so apportioned to the township of Wayland was spread upon the assessment roll for that year, in the column of 'county taxes.'

"It is claimed, on the part of the defendants, that the board of supervisors had no authority to raise by tax the sum of $300, or any less sum, for 'Agriculture,' and that the levy thereof was therefore void; and, as a consequence, the plaintiff's tax title for that year is void.

"The record as above set forth, taken together, sufficiently shows that the $300, termed 'Agriculture' in the report of the committee on finance, means the same item of $300 recommended in the report, as amended, of the committee on agriculture to be appropriated to the Allegan County Agricultural Society, and not another or different item; and no claim is made that the board had not ample authority to vote this sum to be raised for the benefit of said society."

The law authorizing the board of supervisors to levy a tax for the benefit of agricultural societies is found in How. Stat. § 2298. We have several times held such levies void for noncompliance with the statute. *Hogelskamp v. Weeks*, 37 Mich. 428; *Hall v. Kellogg*, 16 Id. 135; *Silsbee v. Stockle*, 44 Id. 564 (7 N. W. Rep. 160).

The sworn certificate required by the statute is required to be filed with the clerk of the board. No question is made that such certificate was not filed, and the court rightly ruled that the levy of $300 for "agricultural purposes," in the light of the whole record, did not invalidate the tax, or the deed based thereon, for that cause,

The deed based upon the tax of 1878 is assailed for several reasons, but it is only necessary to mention two.

The qualified voters at the annual township meeting voted to raise $200 for contingent expenses. The records of the proceedings of the township board for the township of Wayland at a meeting held October 8, 1878, was put in evidence, and shows that—

"The board met according to call of the supervisor;" that there were present Fitch, supervisor, Trude, justice of the peace, and Chapple, clerk of said township; and that, on

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motion of Fitch, "$475 was voted to be raised for contingent expenses for 1878;"—

But there is no statement in this record that said board found it necessary to raise any sum for contingent expenses, or any sum in addition to that voted at the annual township meeting for that year.

What has been said with reference to the proceedings of the township board for 1875 applies equally to those of October 8, 1878, and need not be repeated. The sum voted was unauthorized, and the deed based upon such unauthorized levy cannot be sustained.

The judgment must be reversed, and a new trial granted, with costs of both courts to defendants.

The other Justices concurred.

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CHARLES S. BLACK v. JOHN H. MILLER.

Fraud and deceit—Bar—Statute of limitations—Facts found—Judgment—Evidence—Election of remedy.

1. If the facts found entitle a party to a judgment, the giving of *wrong* reasons for reaching that result is immaterial.
2. Oral evidence, not inconsistent with or contradictory of the record, is admissible to show what was litigated, and the grounds of the decision.

   So *held*, where a judge was permitted to identify the parties and the cause of action in a case tried before him, on the trial of a second suit between the same parties, and to testify as to *what* matters were litigated and adjudicated in the *first* suit, for the purpose of ascertaining if the same subject-matter was then actually passed upon as was involved in the *second* suit.
3. A judgment for a defendant in a suit on a promissory note is not a bar to an action for fraud and deceit practiced on the plaintiff by said defendant to induce the purchase of the note.
4. By electing to pursue one of two *inconsistent* remedies, the plaintiff is precluded from resorting to the other. *Button v. Trader*, *ante*, 295.

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5. Statements by the survivor of two joint and several makers of a promissory note, upon which payments had been made by the *deceased* sufficient to bar the operation of the statute of limitations as to *his* estate, made to a proposed purchaser of the paper, to the effect that it was as good a note as he could make, and that it would be all right to purchase it, as he intended to pay it, the payor being ignorant of his statutory defense, are insufficient to warrant a recovery by the purchaser for fraud and deceit in inducing such purchase, he having been defeated in a suit on the note against said payor by the plea of the statute of limitations.

Error to Berrien. (O'Hara, J.) Argued April 16, 1889. Decided June 21, 1889.

Case for fraud and deceit in inducing plaintiff to purchase a note. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Edward Bacon, for appellant.

J. J. Van Riper, for defendant.

LONG, J. It appears that on January 8, 1875, defendant and J. H. Kingery executed a promissory note for $370, with interest at 10 per cent., payable to Almira Post or bearer two years after date.

On May 1, 1885, plaintiff purchased the note for $225, at which time the note bore 15 separate indorsements of money paid, the last indorsement showing a payment of $30 on May 2, 1884. These payments were made by Mr. Kingery in his life-time, without the knowledge of defendant. Defendant made no payments thereon, nor did any other act which prevented the running of the statute of limitations against the note so far as he is concerned.

At the time plaintiff purchased the note, Kingery was dead and his estate insolvent.

Mrs. Post, the payee, applied to plaintiff on May 1, 1885, to purchase the note, which he agreed to do if defendant should first assure him that the note was good, and he would

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pay it. With this understanding plaintiff and Mrs. Post proceeded to the house of defendant. When they arrived there plaintiff alighted from his buggy, leaving Mrs. Post in charge of the horse, and, finding the defendant, informed him that he had been solicited to purchase the note, but that he did not desire or intend to take it unless the defendant said it was all right, and agreed to pay it. Defendant assured him that it was as good a note as he could make, and that it would be all right for plaintiff to purchase it. At plaintiff's request, defendant accompanied him to where Mrs. Post was waiting, and defendant again assured plaintiff, in presence of Mrs. Post, that the note was all right, was just as good a note as he could make, and he intended to pay it.

Defendant declined, however, to make a new note, when they requested him so to do, alleging that he had reason to believe that Kingery's son had money, and that he ought to pay part of the note, which he could not expect him to do if the old note was canceled. Defendant also declined to pay any money on the note that day, for the reason that he had none available. He agreed to see what he could do with Kingery's son, after which he would see plaintiff, and fix the matter up.

Plaintiff paid Mrs. Post $225 for the note, she agreeing to refund him whatever amount the same might be in excess of the fair value of the note. At this time there was only unpaid on the note about $155.

Plaintiff purchased the note in reliance upon the defendant's verbal statements above, and belief in his ability to pay it, and was ignorant at this time of defendant's never having made any of the payments indorsed on the note, and believed that defendant was liable for its payment.

Defendant failed to call upon plaintiff as he had agreed, and when seen in reference to the matter he informed plaintiff that he had been advised by an attorney not to do so, as he was not liable on the note.

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On August 12, 1885, plaintiff sued defendant in justice's court on the common counts in assumpsit, and gave notice that he would give in evidence the note in question. Plaintiff recovered judgment, though the statute of limitations was pleaded. An appeal was taken to the circuit court, and on November 9, 1885, the court, before whom the cause was tried without a jury, gave judgment for the defendant. No further proceedings were had in that cause.

In February, 1888, this suit was commenced, in which it is claimed substantially that the defendant fraudulently and deceitfully induced the plaintiff to purchase the note in controversy, and that the plaintiff purchased the same relying upon the statements and representations so fraudulently and deceitfully made.

The defendant pleaded the statute of limitations, and gave notice of this former suit in bar to the action.

This cause was tried before the court without a jury, and the court found the facts substantially as above stated.

It appears that Judge Smith, before whom the former case in assumpsit was tried, did not file any findings, not having been requested to do so; but it appears from his deposition, which was taken and read in the present case, that his decision was based entirely upon the undisputed facts appearing in that case, that the defendant had never made any of the payments indorsed on the note, and the utter absence of any written acknowledgment or promise by the defendant to pay the note, although it had been due for more than six years before the commencement of suit.

Upon the foregoing facts found by the court in the present case judgment was entered for the defendant; the court concluding, as matter of law, that while the former suit upon the note was not a bar to the present action, and that the statute of limitations could not aid the defense, yet no representations were made by the defendant to the plaintiff, upon which he had relied, as an inducement to the purchase of

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the note, which in law constituted such a case as entitled the plaintiff to maintain the action for fraud and deceit. Defendant's counsel contends that the judgment was properly entered for the defendant for the reasons:

1. That the action is barred by the statute of limitations.
2. That the action is barred by the former suit.
3. That the court was not in error in its conclusion of law that no actionable fraud and deceit had been proven.

The contention of plaintiff's counsel is that the court erred—

1. In disregarding all liability of defendant by the suppression of the truth and by false suggestions.
2. In not holding the defendant estopped from having the benefit of any claim that he did not know of his defense under the statute of limitations.
3. In excusing the defendant, because of supposed honesty, from all liability; the court at the same time finding the defendant guilty of an untruth under oath in testifying: "I told them the note was outlawed; told them both that the note was outlawed."

If any one of the positions taken by defendant's counsel is correct, the judgment in the present case must be affirmed. It does not matter that the court below may have erred in its conclusions of law if the right result is reached. If the judgment should have been entered for the defendant under the facts found, it cannot matter that the court below may have given the wrong reason for reaching that result.

The former suit was brought to recover upon this identical note, and was between the same parties. A trial was had in justice's court, where plaintiff prevailed, and on appeal to the circuit the defendant, after a trial, had judgment in his favor. This action was in assumpsit upon the common counts, with notice that the note would be given in evidence. Defendant pleaded the statute of limitations. The cause was tried by the court without a jury. No written findings were made, and it does not appear from the record itself upon what ground defendant had judgment.

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Defendant was permitted to show, by the circuit judge before whom the cause was tried, that his decision was based entirely upon the undisputed fact that the defendant had never made any of the payments indorsed upon the note, and the utter absence of any written acknowledgment or promise by the defendant to pay the note, although it had been due for more than six years before the commencement of suit. The trial court in considering this case, however, eliminated that part of the proofs, and refused to consider it.

Oral evidence is not admissible to contradict the record, but such evidence, not inconsistent with the record, is admissible to show what was litigated, and the ground of the decision. *White v. Madison*, 26 N. Y. 117. If this were not so, in very many cases it would be impossible to ascertain the matters in controversy and adjudicated in a former case. The evidence of the trial judge was competent for the purpose of identifying the parties and the cause of action, what matters were in litigation and adjudicated, as well as to ascertain whether the same subject-matter was actually passed upon as then in litigation in the present suit. *Merchants' Bank v. Schulenburg*, 48 Mich. 105 (11 N. W. Rep. 826); Freem. Judgm. § 273; 1 Greenl. Ev. § 531, and notes; Bigelow, Estop. 29; Abb. Tr. Ev. 832.

The action in the former suit was in assumpsit upon the note, and the right of recovery was dependent, under the plea of the statute of limitations, on whether any of these payments were made by the defendant, or any written promise or acknowledgment to pay the same was given by him, to bring it out of the bar of the statute. It is apparent that no such proofs were made, and the statute barred the recovery.

In the present case, however, the claim of recovery is upon matter arising in the year 1885, at the time the plaintiff purchased the note, and, if the plaintiff had a right of recovery, it is apparent such right is not affected by the statute. The

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claim of recovery is for the same sum of money,—the principal and interest due on that identical note. It is between the same parties. The plaintiff attempted to recover, first, in an action of assumpsit, and was met by the statute, which proved to be a bar. Plaintiff commenced *de novo* to recover these identical moneys in an action for fraud and deceit. It is apparent that these actions were not for the same cause, but for entirely different and distinct causes, and the doctrine of pleading a former suit in bar has no application to the case.

But was there an election of remedies by the bringing of the first suit, so that the plaintiff is estopped from maintaining this action? It is well settled that a man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. *Thompson v. Howard,* 31 Mich. 311; *Rodermund v. Clark,* 46 N. Y. 354; *Morris v. Rexford,* 18 Id. 556.

The plaintiff knew at the time of the commencement of the first suit that the defendant denied all liability upon the note; that he had counseled with an attorney, who had advised him he was not liable upon it, he not having made any of the payments indorsed upon it, and more than six years having elapsed from the time it became due. These facts were all known to the plaintiff at that time, as well as the facts upon which he now relies for a recovery,—the fraud and the deceit of the defendant, if such existed. He knew all the facts and circumstances surrounding the transaction as well then as at the time of the commencement of the second suit. He made his choice of remedies, and while it is true one may not be entirely inconsistent with the other, yet the policy of the law is to estop parties from pursuing some

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other mode of redress after having elected their remedy, that there may be an end of litigation.

The rights of the parties, however, are so well settled by our views upon the other branch of the case, that we express no opinion upon this question.

The court below very properly held that the facts found did not warrant the consideration that any actionable wrong had been committed. The only representation made by the defendant, as found by the court below, was that when the plaintiff found the defendant, and informed him that he had been solicited to purchase the note in question, but did not desire nor intend to take it unless the defendant would say it was all right and agree to pay it, defendant assured him it was as good a note as he could make, and that it would be all right for plaintiff to purchase it, and at plaintiff's request he accompanied him to Mrs. Post, and again made the same representations, and agreed to pay it.

It is apparent that the defendant thought at that time he was legally liable upon the note, and evidently intended to pay it, though he insisted that the son of the deceased maker ought to pay one-half of it, and told the plaintiff he would see him, and see what he would do about it. The plaintiff sought the defendant out to make the inquiry. The note bore the indorsements, and upon inquiry from Mrs. Post the plaintiff could readily have learned that the payments were made by the deceased maker of the note, and not by the defendant. There was no fact concealed, no suppression of truth or false suggestion. There was no representation of a fact which did not exist, and upon which plaintiff relied in making the purchase. He was told by the defendant that he intended to pay the note; that it was as good a note as he could make.

He was not then legally liable to pay it, and his promise at that time to pay it would not take it out of the statute. It was not made in writing. As is well stated by defendant's counsel,—

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"If he had stated that he made the payments that kept the note alive, when in fact they were made by Kingery, the deceased maker, it would have been a false representation, which would have estopped him from claiming the benefit of the statute, and made him liable, if the plaintiff had made the purchase in reliance upon the statement."

The plaintiff at the time of the purchase did not seem entirely satisfied that the note would be paid, but urged upon the defendant the giving of a new note, which defendant declined to do; saying he wanted to see Mr. Kingery's son, and if he would pay half he would pay the balance. In fact, the parties seem to have separated on that occasion with the understanding that defendant would see Kingery's son, and advise plaintiff what would be done. The defendant, being advised then that he was not legally liable on the note, at once advised the plaintiff of that fact, and declined to pay it.

The representations made amount to no more than a declaration which appears to have been made by defendant in good faith, in the full belief that the note was all right, and that he was legally liable upon it, and would therefore pay it, but that he wanted Kingery's son to pay half of it, and would see him, and advise the plaintiff.

He made no representation that he had no defense to the note; neither did he make any representations as to any matters of fact which were peculiarly within his own knowledge, and not within the knowledge of the plaintiff. The note was not produced there, and no inquiry was made about the indorsements, or who made the payments.

This case, upon the facts found by the trial court, does not come within the ruling in the cases cited by plaintiff's counsel.

We find no error in the record, and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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MOSES MOORE v. THE TOWNSHIP OF KENOCKEE.

Municipal corporations—Injury from defective bridge—Notice to township—Measure of damages—Repeal of statute.

1. A repealing statute, containing no saving clause, which *substantially* re-enacts the law repealed, does not affect a pending suit brought under the original act.

   So *held*, where judgment in a suit for injuries to personal property, brought under Act No. 244, Laws of 1879, was rendered *after* the repeal of said statute by Act No. 264, Laws of 1887.

2. The act repealed is often an aid in the construction of the repealing act.

3. The word "notice" is not used as synonymous with the word "knowledge" in the proviso to section 2 of Act No. 264, Laws of 1887.

4. Whatever fairly puts a party upon inquiry is sufficient notice, where the *means* of knowledge are at hand, and the omission to make such inquiry charges him with (knowledge of) all the facts which by a proper inquiry he might have ascertained.

5. "A person is chargeable with constructive notice where, having the means of knowledge, he does not use them." *Converse v. Blumrich*, 14 Mich. 120.

6. A general verdict for a plaintiff under Act No. 264, Laws of 1887, for damages sustained by reason of the defective condition of a bridge, will be sustained by evidence tending to show—

   a—That the bridge was 14 years old at time of the accident, and that the stringers, a portion of which were produced before the jury and found to be rotten, were of a kind which, as situated, could not be expected to remain sound longer than six or eight years

   b—That shortly before the accident the commissioner of highways of the township, and the overseer of the district, in which the bridge was situated, were notified that the same was out of repair, and the commissioner made no examination of the bridge, and the overseer caused it to be replanked, but put in no new stringers.

7. The following propositions contained in the charge of the court are indorsed as correct:

   a—It is the duty of a township, through its officers, to exercise reasonable supervision over its roads and bridges, and to see, within practicable limits, that they are kept in a reasonably safe condition for public travel.

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b—When it is generally known that a bridge has become decrepit, or when it has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed on the ground of want of *actual* notice of the dangerous infirmity.

c—The measure of plaintiff's damages in case of recovery will be such an amount as will justly compensate him for the injury to the engine, and in this connection may be considered the cost of removing it from the creek, the making of reasonable repairs made necessary on account of injuries growing out of the fall, and its reduced value, if any, after such repairs from the value before the accident.

Error to St. Clair. (Canfield, J.) Argued April 17, 1889. Decided June 21, 1889.

Case for injuries to property by reason of non-repair of a township bridge. Defendant brings error. Affirmed. The facts are stated in the opinion.

Atkinson, Vance & Wolcott, for appellant.

Avery Brothers, for plaintiff.

LONG, J. This action is brought to recover damages to a traction-engine, caused by breaking through a bridge on one of the highways in defendant township, and was tried before a jury, and plaintiff had verdict and judgment for $500. Defendant brings error.

The injury to the engine occurred on August 11, 1886. The plaintiff on that day was passing over what is called "Benner Bridge" with the engine, when some of the stringers broke, and the engine fell to the creek, some six or seven feet below. It cost $43.25 to raise it out of the creek, and $142.52 to repair it.

Testimony was also given tending to show that the engine received permanent injuries. This testimony was to the effect that the boiler had braces inside to strengthen it, and it could not be told by an examination whether or not these braces were broken, and that by reason of this uncertainty such a boiler and engine were worth much less after hav-

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ing sustained such a fall, even though no injury was apparent.

There was also some evidence that the threshing-machine used with the engine was idle 16 days by reason of the accident, but this was not allowed as an element of damages by the court, and need not be discussed.

Testimony was given on the trial tending to establish such facts and circumstances as that, by the exercise of reasonable care and diligence, the defendant township would have known of the defective condition of the bridge, regardless of whether it had knowledge or had been notified of such condition.

After the jury had been sworn to try the cause, the defendant's counsel interposed the objection that Act No. 264, Laws of 1887, repeals the old law of 1879, which gave a right of action in this class of cases, without a saving clause of actions then pending, and, inasmuch as this suit was not in judgment at the time of the repeal of the law, the right of action fell with the passage of the act of 1887.

The injury to the engine occurred August 11, 1886. Suit was commenced November 19, 1886, and judgment was entered June 8, 1888. The act of 1887 took effect June 27, 1887, and repealed the law of 1879. This was after the injury to the engine, and after the suit was commenced, but before the matter went into judgment in the court below.

We think, however, that the case falls within the rulings of this Court in *Merkle v. Township of Bennington*, 68 Mich. —— (35 N. W. Rep. 846). In that case it was said:

"The repealing statute substantially re-enacts the law repealed, with some slight modifications so as to include in the remedy afforded by its provisions damages for injuries received in consequence of the negligence of municipal corporations to keep sidewalks in repair, and to abolish the common-law liability to actions for negligence against such corporations. Upon consideration of the matter, we have concluded that the plaintiff's right of action is not affected by the act of 1887."

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The question came before this Court again in *Alexander v. City of Big Rapids*, 70 Mich.——(38 N. W. Rep. 227), and the Court said, citing *Merkle v. Township of Bennington*, that—

"The section of the statute under which the present suit was instituted was repealed by the act of 1887, but the latter is substantially a re-enactment of the former section (How. Stat. § 1442, and Laws of 1887, p. 345, § 1), and, when such is the case, we have held such repeal does not affect a suit commenced under the first act."

It is contended, however, by counsel for defendant, that the above cases had each passed into judgment in the court below before the act of 1887 went into effect, and that in the case of *Alexander v. City of Big Rapids* the action was brought under section 1 of Act No. 244, Laws of 1879, while in the present case the action is brought under the second section.

Section 2 of the act of 1887 is substantially a re-enactment of section 2 of the act of 1879. The proviso of this section in the act of 1879 reads as follows:

"*Provided*, that in all actions brought under this act it must be shown that such township, village, city, or corporation has had reasonable time and opportunity, after such highways, street, cross-walk, or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein."

In section 2, of the act of 1887 it is provided—

"That in all sections brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity, after knowledge by or notice to such township, village, or city that such highways, streets, bridges, sidewalks, cross-walk, or culvert have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice."

The changes made in section 2 of the act do not in any manner change or affect the *cause* of action.

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Section 1 of this act, under which the action in *Alexander v. City of Big Rapids* was brought, provided for a recovery for personal injuries, while section 2 provided for a recovery for injuries to personal property. The fact that the matters involved in the present controversy had not passed into judgment at the time of the repeal of the act of 1879 does not affect the right of recovery here. That part of section 2 which gave the right of action remains substantially unchanged in the act of 1887, except it is extended to injuries received on sidewalks, and the proviso in that section does not affect the right of action. There is no substantial difference between these two statutes, and evidently it was not the intention of the Legislature by the act of 1887 to deprive any one of a right of action which existed under the former act.

The counsel are also in error in supposing that the case of *Alexander v. City of Big Rapids* had gone to judgment at the time of the taking effect of the act of 1887. It was not then in judgment in the court below, but the ruling in that case in this Court followed *Merkle v. Township of Bennington*, before cited.

Some contention arises in the case upon the construction to be given to the proviso of section 2 of the act of 1887; defendant's counsel claiming that it was the intent of the Legislature, in the change made in the language between this and the proviso of section 2 of the act of 1879, that the township must have some *actual* knowledge of the defect, or there must be proof of notice to the officers of the township, whose duty it is to repair, that the bridge is in an unsafe condition for public travel; and counsel contend that there is no proof of these facts in this case, and that the trial court was in error in leaving the whole testimony to the jury, from which they were to determine whether the town had such knowledge or notice.

It appeared upon the trial that this bridge was built in

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1872, some 14 years before the injury to this engine, and that the stringers had never been removed or renewed, and that the class of timbers used for stringers, situated as they were, could not be expected to remain sound and fit for that purpose longer than six to eight years. A portion of the stringers were brought before the jury, and were found to be very rotten, and the highway commissioner admitted on the trial that they were unfit for use. The plaintiff had passed safely over this bridge with his engine a day or two before, saw new covering of plank upon it, and it appeared safe. The bridge had four stringers, about three feet apart, and was covered with plank over a space of about seventeen feet. All the stringers but one on the west side broke. The plaintiff, in passing over the bridge, put down two planks lengthwise of the bridge to run the wheels of the engine upon. These planks were sixteen feet in length, twelve inches wide, and two and one-half inches thick.

The plaintiff also gave testimony in addition to the length of time these stringers had been used, and their rotten condition, that in 1885 one Anthony Shutler, who was using a traction-engine during that year, observed the rotten and defective condition of the bridge, and called upon John Ready, who was then commissioner of the town, and notified him of its defective condition, and he promised to look after it. It appeared that this commissioner was deceased at the time of the trial, and this portion of the testimony was taken from the jury, under the charge of the court.

This witness also testified that in 1886 he notified George Brown, who was then commissioner of highways of the town, of the defective condition of the bridges in the township, and that he at this time told Brown that he had notified Mr. Ready the year before about the bridges in the town, and that they ought to be fixed.

It also appeared that the attention of the overseer of highways of that road district had been called to the condition of

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the bridge, and he had caused it to be replanked, but put in no new stringers.

At the close of this testimony the defendant asked the court to charge the jury as follows:

"2. The rule regarding liability for failure to inspect and examine roads, etc., as laid down by the Supreme Court in *Stebbins v. Township of Keene*, 55 Mich. 552, was under an old law, and is not applicable to a case under the statute of 1887. The old law made the town liable if it neglected after a reasonable time to repair, etc. (whether the town had notice or not), but the present law requires proof of actual notice and actual knowledge of the defect, and then it must appear that a reasonable time had elapsed after such knowledge or such notice in which to make such repairs, and it must also appear that the town did not use reasonable diligence after such notice or knowledge."

"4. Under this state of facts he must show that the officers of the township had actual notice or knowledge that it had become so defective that the plaintiff could not safely pass over, and without such actual notice or knowledge there can be no recovery.

"5. There is no proof of actual knowledge of any defect in this bridge upon the part of the township officers, and there can be no recovery upon that claim, and if the plaintiff recovers at all, it must be by proof of notice of defects given to the town officers.

"6. There is no proof of notice, except as was given by Shutler to Brown; and if the jury believed that Brown had inspected this bridge, and in good faith supposed it sufficient, and understood Shutler to refer to another road, then there is no notice whatever sufficient to render the town liable under the statute."

These requests the court refused to give in his charge to the jury. The court, however, charged the jury upon this part of the case as follows:

"In regard to the information claimed to have been given to the commissioner by the witness Shutler, you will determine from the evidence what was said, and whether it was sufficient to fairly apprise the commissioner that the bridge was unsafe. * * * If you believe that to be the fact from the evidence,—that is, that it was unsafe, and

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that the town officers, namely, the commissioners or overseers of highways, had actual notice thereof, and they had unreasonably neglected to repair the bridge, and make it reasonably safe for travel, having sufficient time to do so,—the defendant would be liable: * * * provided that you find that the engine of plaintiff was not of such weight as to be unreasonable to be transported over the bridge, and the plaintiff himself was not guilty of want of ordinary care and caution in crossing it.

"It is the duty of a township, through its officers, to exercise reasonable supervision over its roads and bridges,—to see, within practicable limits, that they are kept in reasonably safe condition for public travel. Its officers may not ignore the dictates of common sense and the lessons of ordinary experience, or refuse to see or refuse to heed what others see and others understand.

"When it is generally known that a bridge has become decrepit, or when a bridge has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed to take action on the ground of having no actual notice of the dangerous infirmity. This is substantially the rule laid down by the Supreme Court of this State in another case on this subject, and I think it also applicable to this case. So that, if no actual notice of the bridge being unsafe was given to the township officers, still, if they by the exercise of reasonable care, such as men possessed of ordinary and reasonable intelligence might exercise, would have known of such condition, or if through any other means they had actual knowledge that the bridge was unsafe, this would answer the requirements of the statute as to notice or knowledge on the part of the defendant."

It is insisted by counsel for the defendant that they were entitled to have their requests to charge given to the jury, and that the court was in error in this portion of the charge, as under the law of 1879 it was not necessary to show either knowledge or notice to the township, but it was sufficient if such facts existed that they ought to have known, while under the statute of 1887 such actual knowledge by or notice to the township of such defects must be shown before recovery can be had; that it was the intent of the Legislature, in inserting this language in the proviso in the law of 1887, to change

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the rule laid down by this Court in cases brought under the act of 1879.

It is true that a statute revising the whole subject of a former statute, and intended as a substitute, although it contains no words to that effect, operates as a repeal of the former law, and the statute thus repealed must be considered as if it never existed, except as to proceedings passed and closed; yet it is often an aid in construing the statute repealing it.

The rule laid down by the trial court in the present case in that part of the charge above quoted certainly comes within the rulings of this Court in numerous cases arising under the act of 1879.

In *Medina Tp. v. Perkins*, 48 Mich. 71 (11 N. W. Rep. 811), Chief Justice GRAVES said:

"The general duty of a township is to exercise, through its officers, a reasonable supervision over its ways and bridges, and within fairly practicable limits to be watchful of their condition and trustworthiness, and see that they are kept in a reasonably safe condition for public travel. Its officers may not ignore the dictates of common sense and the lessons of ordinary experience, and refuse to see or refuse to heed what others see and understand."

In *Stebbins v. Township of Keene*, 55 Mich. 557, Mr. Justice SHERWOOD laid down the rule as follows:

"It is not necessary, in order to charge the township for the injury received, to show that the commissioner of highways or the overseer had previously been informed by some person of the defects in the bridge, or that they or either of them had actually seen the bridge, or had knowledge of the defects. It is made their special duty, when these defects exist or are likely to exist, to examine and ascertain them, and immediately make the necessary repairs. It is only necessary for an injured party to show upon the subject, by proper testimony, knowledge on the part of the officers of such a state of facts as reasonably and necessarily makes it their duty to examine and act in order to protect the traveling public, and their neglect so to do."

The construction of this proviso in section 2 of the act of

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1887 for which defendant's counsel now contend is that proof must be made by the plaintiff that such defects exist, and that the township has had reasonable time and opportunity to put the same in repair after *express* knowledge or information of such defects. The language of the statute is, "after knowledge by or notice to such township." The word "notice" is not used as synonymous with the word "knowledge." Whatever fairly puts a party upon inquiry is sufficient notice, where the means of knowledge are at hand, and, if a party omits to inquire, he is then chargeable with all the facts which by a proper inquiry he might have ascertained. This rule has long been established, and is well settled in this State.

In *Converse v. Blumrich*, 14 Mich. 120, Mr. Justice COOLEY laid down the rule as follows:

"A person is chargeable with constructive notice where, having the means of knowledge, he does not use them."

The words of the act of 1879 would seem to have made the township liable without regard to the question of notice, but the act has always been construed by this Court that it was only liable in case of negligence, and it could not be held to be negligent until after notice, actual or constructive, that the highways or bridges were out of repair; and the act of 1887 evidently was framed to meet this view, and not to impose new conditions.

We think the charge of the court, taken as a whole, was within the rule, even if the testimony did not show the township had knowledge of the unsafe condition of the bridge; but there was some evidence to go to the jury that the township officers whose duty it was to repair the bridge had knowledge of its unsafe condition, and that question was fairly left for their consideration, under the charge of the court.

Brown was commissioner of highways, and was advised in 1886 that certain bridges were out of repair, this bridge

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among the number, and there is no claim that he made or attempted to make any examination of them.

In the same year the overseer of highways of that district was also notified, and the only repair made was the putting on of new planks.

It is contended, however, that notice to the overseer of highways was not notice to the township.

How. Stat. § 1445, provides that highway commissioners, street commissioners, and all other officers having charge of bridges, etc., and the care and repair thereof, are hereby made and declared to be the officers of the township, etc., wherein they are elected; and by section 1379 it is further provided:

"The overseer shall have the care of all bridges within his district, and shall see that the same are kept in repair, and, when the cost of repairing any bridge shall exceed twenty dollars, he shall report to the commissioner the condition of such bridge, and the necessity for such repairs."

Under the circumstances here stated, the court very properly refused the instructions asked by counsel for defendant, and we find no error in the charge as given. It is conceded that this testimony would have sustained the general verdict under the act of 1879. We think it equally clear that it sustains the verdict under the act of 1887.

One more question remains to be considered. Counsel for defendant asked the court to instruct the jury as follows:

"There has been some evidence introduced tending to show that the engine was worth less after repair than before the accident, and was on the assumption that persons knowing the engine had tumbled would not consider it worth so much, even though there may be no visible defects from the fall. Now, I instruct you, as matter of law, that in estimating the difference in value before the accident and after the repair you must not speculate or presume that there were injuries not proven. You should allow damages only for the actual injuries proven."

The plaintiff had introduced testimony tending to show

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that after the accident, and after repairs, the flues leaked, and it was hard to keep up steam, and that the engine was loose on the boiler. Mr. Cook, who repaired the boiler, was asked by plaintiff's counsel:

"After you had finished the flues, assuming what you could see as to her condition before going through the bridge, what do you say was her reduced permanent value, or what was the permanent damage to that engine?"

The witness answered, under objection:

"I would not give within three or four hundred dollars, because you don't know what is broke. You take one of those small portable boilers, and there is no way to get into them in order to find out what is broke; and they are braced around the fire-box, I think five inches apart. The ends of these stay-bolts are fastened to the sheeting on the inside of the fire-box, and on the inside of the boiler, riveted over and tapped in it. They are used in order to enable the boiler to have its pressure even all over, and if one is broken that point in the boiler is weakened, and it would naturally tend to break the others."

Mr. Clegg, another machinist, was called by the plaintiff, and asked the following question:

"Now, Mr. Clegg, you have seen that engine before and after the accident. Assuming that on the eleventh of August, 1886, it was in good repair and good condition,—had been fixed up for service that year,—and on that day it broke through the bridge, falling a distance of six or seven feet, and the engine being broken so as to require the repairs indicated in Exhibit A [the bill for repairs], and that as a result of the fall the water escaped from the boiler, leaving the fire in the box, so the flues were melted until all, or nearly all, leaked, and seeing the engine in the condition you have afterwards seen it, after repair, what do you say would be the reduced market value of the engine on account of that fall, if anything?"

The witness answered:

"I would not think she was worth within three or four hundred dollars, because an engine falling in that shape certainly must strain it terribly, and that I noticed in the smoke-chamber end that she had leaked in the bottom or close to

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the bottom where those castings were broken, and that would stand to show, in my idea, that there was a terrible wring to the body of the boiler, causing a strain of the stay-bolts very much."

He was then asked the difference in value of the engine before and after the accident, and answered that before the accident she was worth from $1,000 to $1,100, and after the fall from $600 to $700.

Mr. Shutler was called, and asked what was the value of the engine as it lay in the creek after the fall, and said it only was worth one-half cent a pound, for old iron, because when a concern is wrecked like that something will happen, and farmers will kick continually, and you cannot earn anything with it; consequently it is no good, and you lose more than you make; that the engine before the accident was worth from $1,100 to $1,200, and after its repair from $500 to $600, if you could find a man who wanted it.

The deposition of Mr. Louis Minnie was read. He had been on the lakes as engineer for several years, knew this engine, and helped to fix it up before the accident, and worked upon it afterwards. He testified that it was not worth as much into $300 after it was repaired as it was before the accident; that there might be bolts and braces broken inside the boiler, which would cause great injury, and a man buying a boiler of this kind does not know what he is buying; that it will never be as valuable as before the accident.

This is substantially all the evidence given on the trial regarding the permanent injury to the engine.

Upon the question of damages the court charged the jury as follows:

"Should you conclude that the plaintiff is entitled to damages, you should award him such an amount as will justly compensate him for the injury to the engine; and in regard to this you may consider the amount necessary to remove the engine from the creek, the value of reasonable repairs made necessary on account of the injuries growing

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out of the fall, and the reduced value of the engine, if any, after such repairs were made from its value immediately before the accident."

We think the court very properly refused the defendant's requests to charge, and we see no error in the charge as given.

The complaint is made that this testimony, or the most of it, was incompetent, and that the estimate of damages made by these witnesses was purely speculative. This is not so. One possessed of ordinary knowledge of the construction of such machinery could not resist the inference that the engine must have received some permanent injury by the fall, and, when coupled with the fact that fire was kept up sufficient to generate steam to propel it along the highway, and by the fall the water escaped from the boiler, necessarily some injury must result to the flues from the fire. These witnesses, however, were mechanics, machinists, experts in the business, and speak from actual examination and experience, giving reasons for their opinions. We think the testimony was competent, and tended to show some permanent injury.

We have examined the other questions raised, but need not discuss them.

We find no error in this case, and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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W. W. Nash v. The Manistee Lumber Company.

Settlement—Fraud or mistake—Unconscionable advantage—Evidence—Deposition—Copy of bill of sale.

1. A copy of a bill of sale attached to a deposition by the commissioner, pursuant to an interrogatory calling for the production of the original and the attachment of said copy, is competent evidence without the production of the original paper.
2. Courts cannot disturb a compromise between parties, unless upon satisfactory evidence of mistake or fraud, or of an unconscionable advantage taken by one over the other.

Error to Manistee. (Judkins, J.) Argued April 17, 1889. Decided June 21, 1889.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Dovel, Smith & Smurthwaite, for appellant.

Ramsdell & Benedict, for plaintiff.

Long, J. On September 2, 1886, defendant, doing business at Manistee, Michigan, entered into a written contract with Young & Nash, of Ottawa, Illinois, for the sale and delivery at Chicago, Illinois, of a quantity of lumber, and piece and bill stuff. The piece and bill stuff was to be priced at Chicago market on day of delivery there, and the lumber at $15 per M. feet. The terms of sale were one-fourth cash on delivery, and 30-day note for balance.

The plaintiff was one of the firm of Young & Nash, and executed the contract for the firm, but, before doing so, visited Manistee, and saw the lumber piled on defendant's dock. The piece and bill stuff had not yet been cut, but was to be manufactured according to specification contained in the contract, and the whole to be tallied by Manistee inspectors. No

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guaranty of quality of lumber was made, but it was to be sold on straight tally.

The defendant manufactured the piece and bill stuff, and it, with the lumber, was tallied, and on September 8, 1886, it shipped the whole, by schooner Toledo, to Chicago, and on September 11 forwarded the bill for the lumber to Young & Nash.

On September 15, Young & Nash wrote defendant, inclosing payment of one-fourth of the purchase price of the whole cargo, according to the contract, and complaining of the quality of the lumber shipped. Defendant replied September 20, assuring them that it had shipped the identical lumber sold, and fully performed its contract. Young & Nash wrote again September 22, desiring to submit the matter to a Chicago inspector. The defendant wrote that it had nothing to submit to any inspector, as the contract had been fully complied with on its part. October 4, Young & Nash wrote again, declaring that defendant must accept the offer made,—the amount of the bill, as rendered, less $1 per M. on the lumber and 50 cents on piece stuff,—or they would hold the same, subject to defendant's order, and the payment of freight and money paid by them. To this letter defendant replied as follows:

"As you have got our lumber, of course you have the advantage of us, and you appear to know it, and your letter indicates that we must take what you feel disposed to pay us. As the 30 days will be up shortly, on the eleventh or twelfth, send us check."

October 13, Young & Nash wrote inclosing check for $2,546.89, being the amount of the purchase, less the above deductions. In this letter they stated:

"If you care to have any further dealings with us, we would like to contract for 100 M. No. 1 Norway bottoms, same as last lot. If you care to sell them please advise."

On June 7, 1887, the parties entered into a new contract

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in writing, by which the defendant agreed to sell to Young & Nash all the No. 1, 11 and 12 feet Norway pine wagon boards it should manufacture during the season of 1887, up to about 100 M. feet, at $16 per M., delivered at Chicago, to be paid, $6 per M. on signing agreement, and the remaining $10 per M., and one-half cost of inspection, on arrival of vessel at Chicago having any or all of such lumber on board, etc.

Upon the completion of this contract, Young & Nash remitted to the defendant the sum of $600. Defendant shipped all the wagon boards manufactured by it that season, when on November 10, 1887, W. W. Nash wrote it as follows:

"Please advise whether you expect to send any more Norway boards this fall. There is a balance due of 30 M. feet on the 100 M. feet contract. If you can make another shipment very soon, we would be glad to have them; but, if not soon forwarded, the canal will close for the winter, and we would then not want to receive any more lumber until spring. We will probably want as many as 100 M. of the Norway boards for next season, and should you have any considerable quantity accumulated this fall, too late for shipment, we can probably make an arrangement with you to take them in the spring. Please let us hear from you."

On November 12, the defendant answered this letter as follows:

"It is not likely that we shall make any more wagon boards during the season; that is, not enough to speak of. There has been so much call for 12-feet stuff of other dimensions that we have not made very many for some time, and it does not now appear probable that we shall make many next year. We have taken the liberty to apply the remainder of the $600 not exhausted on the wagon boards to the payment of the balance due us on the shipment of last year, and interest thereon, which we trust will be satisfactory."

This balance, with interest added, amounted to about $200. Afterwards, Nash, claiming to have succeeded Young & Nash, brought this suit to recover from defendant the balance of the $600 so kept back by it and applied upon the old account, which plaintiff claimed had been compromised and

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settled in full. This amount kept back and so applied by the defendant is conceded to be the sum of $208.21, and for which plaintiff had verdict and judgment in the court below. Defendant brings error.

On the trial in the court below the deposition of the plaintiff, taken in Illinois, was produced and read by his counsel, from which it appears that Young & Nash carried on a retail lumber business at Ottawa, and had a business office in Chicago.

In answer to an interrogatory the witness stated that he purchased the interest of Young in the business, and that such purchase was evidenced by a bill of sale. The witness produced the bill of sale to the commissioner, who made a copy thereof, and attached it to the deposition. This was done in compliance with the instructions contained in the interrogatory. This bill of sale, as shown by said copy, was executed on November 2, 1887, and conveys all the interest of Young in the capital stock, stock on hand, and bills receivable in the business to Nash, the plaintiff.

Defendant objected to the reading of the answer to this interrogatory, and the copy of the bill of sale, for the reason that the copy was not the best evidence. The court overruled the objection, and permitted the answer and bill of sale to be read.

In this the court was not in error. The deposition was taken under the following stipulation signed by the attorneys of the respective parties:

"It is hereby stipulated, in the above-entitled cause, between the respective parties thereto, by their attorneys, that the deposition of W. W. Nash, of Ottawa, Illinois, may be taken under oath before Clarence Griggs, special commissioner for that purpose, on the direct and cross interrogatories hereto annexed, as testimony in behalf of the plaintiff. The same, when so taken, may be transmitted by said commissioner to the clerk of the court, and may be used on the trial of this cause, subject to the same objections as if taken in open court."

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The interrogatory to which the answer was made is as follows:

"If you claim that you have succeeded to the rights and interests of the firm of Young & Nash, and, in particular, to the rights of said firm in the agreement with the defendant, set forth in the declaration, state fully how this was; produce any written evidence you have before the officer taking the deposition, and allow him to attach a copy thereof."

Under this interrogatory the witness produced the bill of sale, and the commissioner attached the copy. We think this is of the same effect, under this interrogatory and the stipulation attached, as if the original on the trial had been brought into court, identified, and a copy left by agreement for convenience. It is evident that counsel for plaintiff, in preparing this interrogatory, intended to have a copy of this identical paper made and attached, to be used as evidence; and the stipulation signed by defendant's counsel refers to the interrogatory as attached.

It is true, the original paper is the best evidence of the facts contained in it, yet, under the circumstances here, it is very evident that defendant's counsel were not claiming that the paper was not an exact copy, but were seeking to avoid the effect of their stipulation by a technicality. No exception was taken to the interrogatory at the time the stipulation was signed, and defendant made no demand for the original. The copy was properly received in evidence.

The real defense to the claim of plaintiff, however, is that, at the time the new contract was entered into, in 1887, between the parties, the defendant had a claim against Young & Nash growing out of the sale of 1886, and that it had the right to retain sufficient of this $600, paid as the first installment on the contract of 1887, to meet that claim.

The defendant claimed that the lumber, piece and bill stuff, shipped in 1886, was in full compliance with the contract, and that the claim made by the plaintiff that it did not so comply with the contract was entirely groundless, and not

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made in good faith, but was made for the purpose of taking advantage of the situation of the parties, and a fraud upon it, and by which it was compelled to receive a less amount than the lumber was actually worth, and that the money was not actually paid in such a way as to amount to a compromise and satisfaction of its claim.

The secretary of the company, Mr. Wente, testified that at the time of accepting the proposition made by Young & Nash to take off the $1 per M. on the lumber, and 50 cents per M. on the bill stuff, they concluded to take what they could get for the time being, and take chances on the future to get the balance.

Defendant also gave evidence tending to show that the piece and bill stuff was in accordance with the contract, and that the lumber was seen by Mr. Nash, before the purchase, as it lay in piles upon the dock; that only such lumber was shipped as Nash selected; and that he made no claim that any guaranty of quality was ever made by defendant.

The plaintiff's claim is, and he gave evidence tending to show the fact, that the lumber shipped under the contract of 1886 was not in compliance with the contract, but was of less value, and not of the quality for which they bargained; that they found fault with it, and notified the defendant, and finally offered to pay a certain price, which the defendant accepted, and that money was paid, and no fault found with it until the defendant set up the claim in its letter in 1887.

On this question the court instructed the jury as follows:

"If these two men in Illinois made an unfounded claim (they claim here this lumber was not according to contract), and made that knowingly, knowing there was no color of right to it, but asserted an unjust claim, and induced the parties to compromise, under the circumstances, in order to avoid litigation, etc., it would not be binding on the company here; but, if these two men did find fault with the lumber, and had good reason for finding fault, if it did not comply with the co tract, and they talked about it, and they

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finally made this offer in good faith, and these parties said, 'We will take the money,' and took it, they are bound by the contract, because, in that case, there would be a valid dispute between the parties, settled up by agreement. * * * On the other hand, if it were a fraudulent scheme on the part of these parties to beat defendant out of money, it would not be binding."

Defendant's counsel submitted several requests to charge upon this part of the case, which the court refused to give. We see no error in this refusal. The parties tried the case upon the issue so made, and the court submitted the case to the jury upon this theory, and, as we think, very fairly to the defendant. The requests to charge were many of them covered by the general charge, and those not covered the court was not in error in refusing.

The defendant accepted the money tendered by Young & Nash as a settlement under the contract of 1886. It made the settlement deliberately, but claimed that it was coerced into making it, from the fact that the parties resided in another state, and it was cheaper to settle than to litigate, though the deduction claimed from the price of the lumber and bill stuff was wrongful and fraudulent. If this theory was true, it had an opportunity to make it appear to the jury, and the jury were very fully and fairly instructed, if they found this to be true, they should find for the defendant; but it appears that the jury found in favor of plaintiff's theory that some deduction should have been made, and that Young & Nash were acting in good faith in making the claim.

Courts cannot disturb a compromise between parties, unless on satisfactory evidence of mistake, fraud, or unconscionable advantage. *Gates v Shutts*, 7 Mich. 127; *Converse v. Blumrich*, 14 Id. 120; *Hull v. Swarthout*, 29 Id. 250; *Craig v. Bradley*, 26 Id. 354; *Prichard v. Sharp*, 51 Id. 432 (16 N. W. Rep. 798).

The jury settled this question, and we cannot disturb it.

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We find no error in the record, and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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SAMUEL R. MILLER v. BENJAMIN F. WELLMAN.

Trespass—Removal of timber—Possession—Burden of proof—Damages—Evidence.

1. To maintain trespass, the plaintiff must have either *actual* or *constructive* possession of the land, and *constructive* possession cannot exist where there is an *actual* adverse possession. *Ruggles v. Sands*, 40 Mich. 561.
2. Trespass, under the statute, may be brought by the land-owner, regardless of the question of possession.
3. In an action of trespass against one in possession, the burden of proof is upon the plaintiff to show title to the land trespassed upon.
4. The measure of damages in a statutory action of trespass is the value of the timber if standing, and the diminished value of the estate by reason of its removal. *Skeels v. Starrett*, 57 Mich. 354.
5. The price at which timber cut by a trespasser sold, less the cost of cutting and marketing it, is some evidence of its value, though not conclusive.

Error to Kent. (Grove, J.) Argued April 17, 1889. Decided June 21, 1889.

Trespass to lands. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Smedley & Irwin, for appellant.

Clark H. Gleason, for defendant.

LONG, J. In 1881 plaintiff purchased of Robinson, Letellier & Co., on a land contract, the south half of north half of

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north-east quarter of section 5, township of Tyrone, Kent county, Michigan, and in 1888 obtained a deed thereof.

On the same day defendant purchased, by like contract from the same parties, the north half of north half of north-east quarter of the same section.

Plaintiff and defendant each at once went into possession of the land he supposed belonged to him, and continued in possession thereof to the time of the commencement of this suit.

The boundary line between the two parcels of land has been more or less in dispute; the parcel in controversy being about eight rods in width at one end and tapering to a point at the other.

Soon after this purchase, and in 1881 or 1882, defendant built a division fence between him and the plaintiff along the south side of this disputed strip, and from that time had been in possession of this strip, cut timber therefrom in 1885 and 1886,—some pine, ash, and basswood trees.

Defendant claims that these trees were all cut and removed from the land not later than December, 1885, more than two years prior to the commencement of the suit, and with permission of the plaintiff, while the plaintiff claims that they were cut and drawn away on or about February 15, 1886.

This action is trespass *quare clausum*, with a count added for treble damages under the statute for cutting and carrying away this timber.

On the trial in the court below defendant had verdict and judgment.

Plaintiff brings error.

The action was commenced on February 6, 1888.

The declaration contains five counts. The first four are common-law counts, and the last is the statutory count resting on chapter 272, How. Stat., relating to trespass on land.

The pleas are the general issue, the statute of limitations, title in fee to and actual possession of the lands whereon the

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alleged trespass was committed, with license to enter and do the acts constituting the trespass; and notice that, if committed by the defendant, the trespass was casual and involuntary, and that defendant had probable cause to believe that the land upon which the alleged trespass was committed was his own.

On the trial the plaintiff waived all claim for treble damages, and the defendant introduced in evidence the land contract and deed, and gave evidence tending to show his possession since 1881 of the land described in the deed.

The plaintiff also introduced his contract and deed, and testimony tending to show possession in himself since 1881 of the land mentioned therein, and evidence tending to show that the boundary line between these two pieces of land had always been in dispute and undetermined prior to the alleged trespass, and that afterwards he had caused a survey to be made of the north half of that fractional quarter section, dividing the same into two equal parts by running a line east and west, so as to give the same number of acres north of the line as south of it,—about forty-eight ac es in each parcel,—and that the line so run by the surveyors was about eight rods north of the line where the defendant had built his fence; that prior thereto defendant had cut and carried away the timber, though he had forbid len him to cut or carry the same away.

Plaintiff also introduced testimony tending to show that he had always claimed this strip of land, and had attempted to cut timber thereon, but had been prevented by defendant.

He also gave testimony of the value of the timber, and that the same was cut and removed within two years before the commencement of the suit, and that the value of the land was decreased by the removal of such timber.

The defendant's claim is, and testimony was introduced tending to show the facts, that he never was forbidden by the plaintiff to cut or remove the timber; that in 1881 or

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1882 he built the division fence, inclosing this disputed strip, on what he considered the boundary line, and had been in continuous possession of this strip up to said fence until after the alleged trespass, claiming to own it, cultivating a portion of it, and pasturing the balance; but that at the time of the trial the fence was on the line established by the survey.

Defendant also introduced testimony tending to show that it cost as much or more to cut and carry away, and get into market, the timber so taken as he received for it; also that the value of the land was increased, rather than decreased, by the removal of the timber; that the best class of timber—the green pine—was sold for six dollars per thousand feet, and the cost of cutting and getting to market was three dollars; that the ash was sold for five dollars, and cost over three to cut and market it, and that the balance cost more to cut and market than it brought in the market; that the land from which it was cut was stump land, and had been lumbered over, and all that was considered of value then taken off; and that no timber had been cut or removed within the two years next prior to the commencement of the suit.

Upon the issue so made the cause was submitted to the jury.

The court charged the jury as follows:

"If you should find that, at the time of the commission of these alleged trespasses, the defendant was in possession of the land where the timber was cut, the plaintiff will not be entitled to recover under either of the first four counts of the declaration.

"In considering the last or fifth count of the declaration, the question of possession is not involved. The action is trespass for cutting down and carrying off certain timber from certain lands in Tyrone township, in this county, without the leave of the plaintiff, who claims to be the owner thereof."

There is no contention over this portion of the charge.

There are three errors assigned, and all relate to the fol-

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lowing from the charge of the court, or to other portions thereof:

"If you find from a fair preponderance of the evidence that the plaintiff, at the time of the commission of the alleged trespass, was the owner of the land whereon the same was committed; that the defendant, within two years prior to the commencement of this suit, cut down or carried off timber of any of the kinds described in the declaration, namely, green pine, dry pine, basswood, and black ash, on the land described in the declaration, without leave of the plaintiff,—then the plaintiff is entitled to recover in this action.

"Upon the question of ownership the contracts and title deeds produced in evidence afford conclusive proof.

"The question of title should be determined by these documents; and, in order to determine whether the alleged trespass was committed on the land owned by the plaintiff or on the land owned by the defendant you will ascertain the location of the boundary line between them. As a matter of law, that boundary line is midway between the north and south lines of the north half of the north-east fractional quarter of section five."

It is contended by counsel for the plaintiff that the court erred in instructing the jury that they must find that the plaintiff was the owner of the land, as the plaintiff might maintain trespass though he was not the owner, if he was in possession at the time the trespass was committed, and that he was in possession under his contract at that time.

We think there is no error in this part of the charge. It conclusively appears, and there seems to be no dispute upon the question, that the defendant was in possession of this strip from 1881 or 1882; had it fenced in with his land; improved and cultivated it, claiming to be the owner. He was in actual possession and occupancy at the time of the alleged trespass. The boundary line was in dispute, but that was not ascertained until the survey was made, long after the timber was cut and carried away.

By the pleadings, and by the evidence, the issue was made as to the ownership of this strip, the defendant claiming to

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own it and the timber he cut from it, and it was for the jury to say, under the evidence, where the line was.

Trespass can be brought only by one in actual or constructive possession, or by one who has the title. Plaintiff could not be in constructive possession of land which was in defendant's actual adverse possession. Plaintiff must either own the land, or have possession of it under color and claim of title, in order to maintain his action.

The charge of the court presented the case to the jury under plaintiff's claim of ownership, and instructed the jury that possession was necessary to recover under the first four counts, while under the fifth count possession is not essential, but ownership is sufficient.

The jury were further instructed that the contract and title-deeds were conclusive proofs of ownership, but the court added:

"In order to determine whether the alleged trespass was committed on the land owned by the plaintiff or on the land owned by the defendant, you will ascertain the location of the boundary line between them. As a matter of law that boundary line is midway between the north and south lines of the north half of the north-east fractional quarter of section five."

The survey made by plaintiff was not final, and did not determine the disputed boundary. It became a question of fact for the jury to determine, and if the timber was cut on land defendant owned, and which was not included in plaintiff's contract and deed, plaintiff could not recover. The burden was upon him to show that the timber was cut on land which he owned, as he was not in possession; and the only question in doubt was as to whom this disputed strip belong d, and where was the dividing line. The jury could not have been misled by this charge, and we do not think it open to the criticism made upon it by plaintiff's counsel.

It is also contended that the court was in error in the following portion of the charge:

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"If you find that the value of the timber standing was less than the cost of cutting it and getting it to market, then upon that element of damages there is not any margin. If you find it was less or equal, then there would be no damages upon that element. If you find the land was not decreased in value by the taking of the timber off of it, then there is no damage arising from the diminishing of the value of the estate. So that if you should find that the value of the estate was not diminished by the taking off of the timber, and that the timber after it was taken off did not exceed in value the cost of taking it off and getting it where it would be available in the market, then your verdict would be for the defendant."

In this the court was in error. It appears that the defendant did make a profit on some of the timber, and there is no contention but that some of it, at least, was valuable. The trespass appears to have been committed, if committed at all, by the defendant under the belief that the land upon which it stood was his. He was in actual possession and occupancy, claiming to own it. There is no contention but that it was taken and carried away. If, however, the jury should find that the plaintiff was the actual owner of the land at the time of its taking, then the measure of his damages would be the value of the timber standing upon the land, and the diminished value of his estate, if any, by reason of its removal. *Skeels v. Starrett*, 57 Mich. 354 (24 N. W. Rep. 100); 3 Suth. Dam. 374.

As was said in *Isle Royale Mining Co. v. Hertin*, 37 Mich. 337:

"It cannot be assumed, as a rule, that a man prefers his trees cut into cordwood rather than left standing, and, if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake."

The rule laid down by the court was not supported by the testimony, the defendant himself admitting that the trees or some of them were sold at a profit, and, if the plaintiff was entitled to recover at all, it would have been at least the

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value thus shown. The price at which it sold, deducting the cost of cutting and marketing, would be some evidence of value, though it would not be conclusive.

For the error in *this* part of the charge, the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

THE DETROIT TUG & WRECKING COMPANY v. GEORGE GARTNER, WAYNE CIRCUIT JUDGE.

New trial—Mandamus—Discretion of circuit judge.

1. The granting of a new trial rests in the discretion of the trial court, which, if not abused, cannot be interfered with by the Supreme Court.
2. To warrant such interference, the abuse ought to be so plain that, upon consideration of the facts upon which the trial judge acted, an unprejudiced person can say that there was no justification or excuse for the ruling made.
3. In applications for *mandamus*, the Court must rely upon the facts set up in the answer of the respondent.
4. The fact that a judgment is obtained for or against a party who moves for a new trial has no bearing upon the question whether the judge has abused his discretion in granting or denying the motion.
5. For a review of cases bearing upon the *main* question decided, see page 371 of opinion.

Application for *mandamus* to compel respondent to grant a new trial. Submitted April 16, 1889. Denied June 21, 1889. The facts are stated in the opinion.

Moore & Moore, for relator.

F. H. Canfield, for respondent.

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CHAMPLIN, J. Application for *mandamus* to compel the circuit judge to grant a new trial.

The granting or refusing of a motion for a new trial is a matter which rests in the discretion of the trial court. It is so clearly so that it is conceded that this Court has no jurisdiction to interfere with the decision of the circuit court, except it be to correct an abuse of the discretion exercised by it.

To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. It is therefore of the first importance that the *facts* upon which the circuit court acted in refusing a new trial in this case should be fully stated and considered. In applications for *mandamus* this Court must rely upon the facts set up in the return or answer of the respondent.

The return of the circuit judge is as follows:

"This respondent, in answer to the order to show cause granted on the thirtieth day of October, 1888, respectfully shows:

"1. It is true, as set forth in the petition of the relator, that a judgment was recovered by Henry McMorran, therein named, against Samuel A. Murphy; and this respondent shows that said judgment was for the sum of $8,329.28, upon a promissory note executed by said Murphy to the said McMorran.

"2. It is also true that said McMorran caused a writ of garnishment to issue under the seal of said court against the First National Bank of Detroit, as garnishee of said Murphy, and that said bank filed its answer and disclosure to said writ, showing that there was on deposit in said bank the sum of $984.65 to the credit of Samuel A. Murphy; and said disclosure further shows that on the fourth day of January, 1888, it had received a notice, of which the following is a copy:

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"'DETROIT, MICH., Jan. 3, 1888.

"'CHAS. B. LOTHROP,

"'Atty. First Nat. Bank,

"'Detroit, Mich.,—

"'*Dear Sir:* All the money in the First National Bank to the credit of S. A. Murphy at the time said bank was garnished by Henry McMorran belonged to the Detroit Tug & Wrecking Company, and you are hereby notified that the company own the same, and will hold the bank responsible therefor.

"'Very truly yours,

"'MOORE & MOORE,

"'Attorneys for Det. Tug & Wk. Co.'

"And this respondent shows that said Moore & Moore are also the attorneys for the said Samuel A. Murphy in the suit in which the aforesaid judgment was recovered.

"3. It is also true, as stated in said petition, that an order was entered in said garnishee suit, requiring the petitioner to appear and interplead, with which order the petitioner complied.

"4. That, said garnishee suit being at issue upon claims by said petitioner, said cause was regularly noticed for trial at the last June term of said circuit court; that said cause was set for trial on Friday, the twenty-ninth day of June, 1888, and that the usual printed notice that said cause would be reached on that day was sent to the attorneys of the respective parties, and that upon the application of said Moore & Moore, attorneys for said petitioner, the trial of said cause was postponed until the sixth day of July, 1888, at which time the plaintiff, who resides at Port Huron, was present in court with his witnesses, ready to proceed with said trial.

"That, upon said cause being called, the attorneys for said petitioner represented to the court that Samuel A. Murphy, named in said petition, was not present, and requested that said trial should be postponed until the next day, and that in compliance with said request the trial of said cause was postponed until the opening of the court on the following day, at which time the said plaintiff with his witnesses were in court, as were also the attorneys for said petitioner, and the said case was called for trial; that petitioner's attorneys stated to the court that they had given said Murphy notice; that they were in no position to ask for further indulgence or further delay; and that the said petitioner's attorneys made no request for any further postponement or for any further delay

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in said trial, but proceeded with said trial without objection, and cross-examined witnesses for the plaintiff.

"After hearing the evidence offered by the plaintiff, the cause was submitted without argument, and without any request by petitioner's counsel for delay, and a judgment was thereupon rendered in favor of said plaintiff, as stated in said petition.

"5. That at no time was any showing made by petitioner or its attorneys of any effort being made to secure the attendance of said Murphy as a witness, either by the issuing of subpœna or otherwise; nor was any cause shown or stated why the petitioner was unable to secure his attendance upon the day when said cause was tried.

"6. That it satisfactorily appeared from the evidence in the case that the said Murphy had an account at said bank in his own name, individually, and that there was at the time no account at said bank with said Murphy as 'president,' or with said 'Murphy, Pt.;' nor was there any account at said bank in the name of said petitioner.

"That the account of said Murphy with said bank was opened on the twenty-third day of August, 1886, the pass-book being in his own name, and that he had from time to time deposited considerable sums of money to said account, drawing against the same by checks in his own name, and that no claim was made that any of the moneys in said account belonged to any other person until after the service of said writ of garnishment.

"That soon after said writ was served said Murphy called at said bank, and asked to see the deposit slip which accompanied the deposit of the $1,813.36; that said slip was in said Murphy's own name, individually, and in his own handwriting; that upon receiving said slip from the bank, and subsequent to the service of said writ of garnishment, he surreptitiously changed the same by adding the letters 'Pt.,' so as to make it read, 'S. A. Murphy, Pt.,' and folded the slip in such a way as to conceal the change which he had made, and that said change was discovered by the book-keeper of said bank immediately after said Murphy had left the bank, and that said book-keeper reported the same to the president of the bank.

"7. It is true, as stated in said petition, that a motion for a new trial was made therein, and that the petitioner, in support of said motion, presented the affidavits attached to said petition, and that there were also presented, in opposition to said motion, by plaintiff's attorneys, certain affidavits, copies

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of which are hereto annexed, marked 'Exhibits E. F, and G;' and that, it appearing to the court from said affidavits, and from all the facts and circumstances, that the petitioner could, by the exercise of ordinary diligence, have secured the attendance of said Murphy as a witness at the trial of said cause, but had failed to do so, or make any proper effort to that end, and that justice between the parties would be promoted by denying said motion, said motion for a new trial was denied.

"Respondent submits that the refusal to grant said motion for a new trial was a proper exercise of discretion on his part, and that the prayer of said petitioner should be denied.

"GEO. GARTNER, Circuit Judge.

"*Dated Nov. 27, 1888.*"

The following are the affidavits against the motion, omitting the entitlement of the case:

"STATE OF MICHIGAN, } *ss.*
County of Wayne, }

"Hercules Desallier, being duly sworn, says that he is acquainted with the defendant, Samuel A. Murphy, and has known him since the seventeenth day of April last.

"That since the eighteenth day of April he has been employed as watchman on vessels in which said Murphy claims to be interested, including the tug 'Gladiator,' 'the Chamberlain,' the schooner 'Johnson,' lying at or near Beaubien's dock, or the dock next above Beaubien's, in Springwells; that on Saturday, the seventh day of July, he was acting as watchman on the schooner 'Johnson,' lying at said dock; that the scow or barge 'Grace Amelia' was being fitted out at that time by said Murphy for Toledo, she being the vessel referred to in an affidavit made in this cause on the ninth day of July by said Murphy, which has been read to deponent; that said barge lay immediately astern the 'Johnson,' on which deponent was acting as watchman, and from which some of the canvas and other outfit was removed to be put on board the 'Grace Amelia.'

"That the deponent saw the men at work, and knows who were there on board and about the 'Grace Amelia' during the forenoon of said Saturday, and that he knows said Murphy was not there during the forenoon, nor was he there until about 7 o'clock of the evening of that day; that deponent saw him when he came (he driving there in his buggy),

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and that he also saw him when he went away, and that he was not there more that about fifteen minutes.

"Deponent feels confident that, had said Murphy been about said scow or barge, or at work in fitting her out as stated in his affidavit, deponent would have seen him there.

"H. DESALLIER.

"Subscribed and sworn to before me this fourteenth day of July, 1888.

"JULIA LINCOLN,
"Notary Public, Wayne Co., Mich."

"STATE OF MICHIGAN, } ss.
County of Wayne, }

"Samuel Murdock, being duly sworn, says that he is personally acquainted with Samuel A. Murphy, and has known him for about two years, and has sailed as a vessel master for him for more than one year; that deponent is now the master of the propeller Chamberlain, in which said Murphy is, or claims to be, interested.

"That on Saturday, July 7, 1888, deponent saw said Murphy on Griswold street in the city of Detroit, between the hours of 9 and 10 o'clock in the forenoon of said day; that said Murphy, when deponent so saw him, was near the corner of Larned street, on Griswold street, and was then going towards Jefferson avenue. Deponent saw him at the Woodward avenue ferry at about 6 o'clock in the afternoon.

"SAM'L MURDOCK.

Subscribed and sworn to before me, this fourteenth day of July, 1888. JULIA LINCOLN,
"Notary Public, Wayne Co., Mich."

"STATE OF MICHIGAN, } ss.
County of Wayne, }

"G. Russell Jenkins, being duly sworn, says that since the trial of the above-entitled cause he has examined the books of the said First National Bank for the purpose of ascertaining what accounts were kept at said bank in which said Murphy was interested, and that the only accounts in which his name in any manner appears during the years from 1879 to 1888, inclusive, are the following:

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ACCOUNTS.

S. A. Murphy.	Opened June 19, '82; Dec. 31, '85; Aug. 23, '86; Sept. 30, '87. Closed Dec. 11, '85; July 29, '86; Sept. 23, '87. Still open.
S. A. Murphy, Pt.	Opened Dec. 28, '87; Feb. 7, '88. Closed Jan 19, '88. Still open.
S. A. Murphy, Tr.	Opened ——. Closed Mch. 11, '79.
T. & S. A. Murphy.	Opened Aug. 17, '88. Closed Aug. 25, '83.

"He further says that if he stated, as a witness, upon the trial of said cause, that there was an account at said bank in the name of S. A. Murphy, Pt., or S. A. Murphy, president, such statement was erroneous; that his subsequent examination of the books of said bank shows that the account of S. A. Murphy, Pt., was not opened until December 28, 1887.

"G. RUSSELL JENKINS.

"Subscribed and sworn to before me on this fourteenth day of July, A. D. 1888.

"JULIA LINCOLN,
"Notary Public, Wayne Co., Mich."

"STATE OF MICHIGAN, } ss.
County of Wayne, }

"H. P. Strong, being duly sworn, says that at the request of Moore & Canfield, attorneys for the plaintiff in the above entitled cause, he carefully examined the 'Annual Reports of Corporations' in the office of the county clerk for the county of Wayne, for the purpose of finding the annual reports of the Detroit Tug & Wrecking Company, a corporation having its office in Detroit, and that he found no such reports on the files for the years 1885, 1886, 1887, and 1888.

"H. P. STRONG.

"Subscribed and sworn to before me this twenty-first day of July, 1888.

"GEO. L CANFIELD,
"Notary Public, Wayne Co., Mich."

"At the request of counsel for relator, I hereby certify, by way of further return to the order to show cause in this cause, that at the close of the trial before me of the cause referred to in my return, and after the judgment had been pronounced, counsel for the said relator asked for five days in which to enter a motion for a new trial, and for a stay of proceedings

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in the meantime; that no objection was made by counsel for the plaintiff to the extension of time.

"And as to the stay of proceedings, counsel for the plaintiff in open court stated that no execution would be issued during the time asked for in which to move for a new trial, and the following memorandum was entered upon the short book by the clerk:

"'Judgment for plff. for $984.65; gar. deft. allowed $25.00 att'y fee. Proceedings stayed till July 16, 1888.'

"All of which is respectfully submitted.

"GEORGE GARTNER,
"Circuit Judge."

The return refers to certain affidavits filed by the petitioner upon the motion for a new trial. Those affidavits are as follows:

"STATE OF MICHIGAN, } ss.
County of Wayne, }

"Samuel A. Murphy, being duly sworn, deposes and says that he is, and for more than a year last past has been, the president of the Detroit Tug & Wrecking Company, and as such has had the principal charge of the finances of the company; and in his absence the finances have been in charge of Mr. Thomas Murphy, his brother, who is, and continually for one year and more last past has been, the treasurer of said company.

"That the stockholders of said company are now, and for more than a year last past have been, as follows: William J. Murphy, holding $21,000; Thomas Murphy, holding $2,000; and this affiant, holding $2,000,—of said stock, the total stock being $25,000.

"Deponent further says that, during the latter part of the season of navigation of the year 1887, the tug Gladiator, with two steam-pumps, all belonging to the Detroit Tug & Wrecking Company, released the propeller Albany from Bois Blanc Island reef, and towed her to Duncan City, for which it was allowed by the owners of said propeller Albany between $1,850 and $1,900.

"The claim was settled a few days before December 15, 1887, and, after making some deductions, amounting in the neighborhood of $50 or $60, the bill was finally paid at the sum of $1,813.86, for which a draft was given by the manager of the propeller Albany to the Detroit Tug & Wrecking

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Company, and the said draft was delivered to the deponent, as the president of said company, and this deponent took said draft on or about the fifteenth of December, 1887, to the First National Bank of Detroit, and deposited the same for collection.

"No part of said money belonged to this deponent, and this deponent had no authority to deposit said money to the credit of any other person or corporation except said Detroit Tug & Wrecking Company.

"After said draft was received as aforesaid this deponent took the same to the First National Bank, and by inadvertence deposited the same in his own name without the addition of the letters 'Pt.,' and drew a number of checks against said money for the purpose of paying the debts of the said Detroit Tug & Wrecking Company, to whom all of said money belonged.

"After the balance of said money remaining in the bank had been garnished by Henry McMorran, this deponent went to the bank to ascertain whether in the deposit slip he had added the letters 'Pt.' after his name, which would indicate that the money was deposited by him as president of the Detroit Tug & Wrecking Company, and was their money. Upon examining this slip this deponent discovered that he had omitted to put these words after his name, and he immediately added the same to his name, as he thought he had a right to do, and also notified the bank at once that the money did not belong to him, but belonged to the Detroit Tug & Wrecking Company.

"Deponent further says that he has been anxious to have this case tried, because nearly $1,000 of the company's money was tied up by the garnishee in this case, and he has urged the company's attorneys several times to hasten the hearing. When this case was first called for hearing this deponent was in Buffalo, and asked them to postpone the case for one day.

"Deponent went to Buffalo, and returned the next day, ready to try the case, but it was postponed beyond the following day. On Thursday morning last this deponent had arranged to go to Buffalo, and notified the company's attorneys of that fact, and requested them not have the case passed. He was anxious to try it. After leaving the office of Moore & Moore, attorneys for said wrecking company, this deponent found that he was not compelled to go to Buffalo, but to Chicago, where he arrived Friday morning. Deponent remained there Friday, and arrived again in Detroit Saturday morning, and immediately after his arrival

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was very busily engaged in getting a boat fitted out for Toledo from a dock in Springwells, and remained at said work until about 9 o'clock P. M. Deponent heard nothing further from the attorneys of the wrecking company, and did not understand that the case would be called on Friday or Saturday; that, if such information was given him at the office of the company's attorneys, he misunderstood it.

"Deponent further says that, had he known that said cause would be tried on Friday or Saturday morning, he would either have been here or sent to this court a statement under oath of why he was unavoidably detained, if he was so detained.

"Deponent further says he understands a telegram was sent to him at Buffalo on Friday last, but said telegram was never received by this deponent.

"Deponent further says that he can be present next Monday, July 16, at 2 o'clock P. M., as a witness in this cause, and will be ready and willing to give his testimony at that time.

"S. A. MURPHY.

"Subscribed and sworn to before me this ninth day of July, A. D. 1888.

"ROBERT ATKINSON,
"Notary Public, Wayne County, Michigan."

"STATE OF MICHIGAN, } ss.
County of Wayne, }

"Thomas Murphy, being duly sworn, deposes and says he is treasurer of said Detroit Tug & Wrecking Company, and has been continually for more than a year last past; that during all of that time, and before, the tug 'Gladiator' belonged to said company; that he knew of the fact that said tug released the propeller 'Albany' from Bois Blanc Island reef and towed her to Duncan City towards the close of the navigation season of 1887, for which said Detroit Tug & Wrecking Company received, after making some minor deductions, the sum of $1,813.86, and said money should have been deposited in the bank to the order of the company.

"That S. A. Murphy, president of the company, was not authorized at any time to deposit that money, or any other money belonging to the Detroit Tug & Wrecking Company, in his own name in the First National Bank of Detroit, or any other bank, and this deponent did not know that said money was so deposited in the individual name of said S. A. Murphy until after the garnishee process was issued and

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served in this cause. Deponent did not know the facts and circumstances under which said money was deposited by said S. A. Murphy in his own name, but this deponent does know that S. A. Murphy was not authorized so to do.

"Deponent further says that on Friday, July 6, he understood and believed that the said S. A. Murphy was in Buffalo, N. Y., and this deponent received from Moore & Moore, attorneys for said wrecking company, notice that this cause would be tried the following morning, and this deponent, believing said S. A. Murphy was in Buffalo, N. Y., telegraphed said S. A. Murphy in words and figures as follows, to wit:

"'DETROIT, July 6, 1888.

"'To S. A. MURPHY, Mansion House,

"'Buffalo, N. Y.:

"'Moore & Moore have got case put over to Saturday morning, but must come to trial then.

"'THOMAS MURPHY.'

"Deponent believed that the above dispatch would reach said S. A. Murphy; and this deponent, who is the proprietor of the Murphy Iron Works, went to Chicago on Friday night on business of his own, this deponent not considering it necessary for himself to be present on the trial of this cause, for the reason that this deponent knew only a portion of the facts in the case, and of which said S. A. Murphy also had as full knowledge thereof as this deponent; and besides, said S. A. Murphy had personal knowledge of the collecting and depositing of said $1,813.86, and the circumstances under which the same was deposited, of which this deponent had no personal knowledge, because this deponent was not present when the money was paid or when the money was deposited.

"THOMAS MURPHY.

"Subscribed and sworn to before me this twelfth day of July, A. D. 1888.

"ALEXANDER G. COMSTOCK,
"Notary Public, Wayne County, Michigan."

It is not claimed by counsel for relator that the Detroit Tug & Wrecking Company is entitled to a new trial as a matter of right; nor is it pretended that the judgment which was rendered in the court below was not properly rendered upon the facts and law of the case. They admit their negligence in not being at the trial with their witnesses, but ask

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under their affidavits, in which they attempt to excuse their negligence, that the judgment may be set aside and a new trial awarded them as a matter of favor, expressing their willingness to submit to any terms which the court may impose as a condition of granting the favor. The motion, then, was not based upon a legal right, but was addressed purely and entirely to the discretion of the trial judge. In granting or refusing the motion the circuit judge exercised a judicial discretion, based upon testimony bearing upon the fact as to whether the wrecking company had sufficiently excused its negligence, and about which there was conflict in the affidavits. The history of judicial proceedings does not furnish a case where, under such circumstances, a court of last resort has held that the trial judge abused his discretion when he has decided without malice and according to the best of his ability upon the weight of the testimony.

It is true that the Constitution has given this Court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this Court can substitute its discretion for that of the inferior tribunal, and compel it to exercise and enforce our discretion, and not theirs. This Court has uniformly held that it has no authority to review the discretion of trial courts in granting or refusing new trials. *Dibble v. Rogers*, 2 Mich. 404; *People v. Branch Circuit Judge*, 17 Id. 67; *People v. Wayne Circuit Judge*, 20 Id. 220; *Greeley v. Stilson*, 27 Id. 153; *Johr v. People*, 26 Id. 426; *People v. Saginaw Circuit Judge*, 39 Id. 123; *Mabley v. Superior Judge*, 41 Id. 32; *Mahoney v. People*, 43 Id. 39 (4 N. W. Rep. 546); *People v. Francis*, 52 Id. 576 (18 N. W. Rep. 364); *Gray v. Barton*, 62 Id. 186 (28 N. W. Rep. 813).

Six of the cases above cited came before this Court upon applications for *mandamus*.

In *People v. Branch Circuit Judge*, which was an application for *mandamus*, this Court said:

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"We are of opinion that there was not an entire failure of any showing, but, on the contrary, there was something upon which the circuit judge was called upon to exercise his judgment; and, that being so, the question whether a new trial should be granted is one addressed to his discretion, *and the Supreme Court has no authority to review his conclusion, and compel him, by mandamus, to rescind his order.*"

In *People v. Wayne Circuit Judge*, this Court said:

"As the motion was properly before the court below, we cannot review its decision on the facts so as to decide whether the new trial should have been granted. *It was a matter of discretion, where the action of that court is not open to review.*"

In *People v. Saginaw Circuit Judge*, this Court held that "*Discretion is not reviewable on mandamus.*"

In *Mabley v. Superior Judge*, a *mandamus* was asked to compel the superior court of Detroit to vacate an order setting aside a previous conditional order for a new trial. CAMPBELL, C. J., said:

"As we have no jurisdiction by *mandamus* to review the discretionary action of courts in such cases as that before us, we cannot grant the writ."

In *Mahoney v. People*, Mr. Justice GRAVES said:

"The refusal of the court to grant a new trial presents no question. * * * The application for the new trial was founded on matters pertaining to the discretion of the court, and not on the ground of absolute legal right."

In *People v. Francis*, Mr. Justice SHERWOOD said:

"We are not permitted to review the discretion of the circuit judge on a motion for a new trial."

In *Gray v. Barton*, Gray had moved for a new trial, which was denied. He then applied to this Court for a *mandamus*, and set forth facts by affidavit which certainly appealed for the exercise of our authority to interfere far stronger than the Detroit Tug & Wrecking Company has done in this case; but his application was refused, and he then filed a bill for the purpose of obtaining a new trial upon several

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grounds, one of which was newly-discovered evidence, and that the judgment was contrary to justice. Mr. Justice MORSE, speaking for the Court, said:

"Complainant has hardly shown sufficient diligence in this respect to entitle him to a new trial in a court of law upon the ground of newly-discovered evidence. * * * Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, *or unless, without any neglect or default on his part,* he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense."

Now, what were the facts presented to the circuit judge upon the motion for a new trial? Briefly stated, they were that the Detroit Tug & Wrecking Company was a corporation composed of three corporators. Samuel A. Murphy was president; Thomas Murphy was treasurer. Under the statute these three corporators must have constituted its board of directors, who had the control and management of its business. The president and treasurer represented the company. The corporation was a party to the record, but Thomas and Samuel Murphy were its representatives, and, for all purposes of appearing in court or prosecuting the suit, must be regarded as the active, responsible parties. They were the only persons authorized to, or who could, look after its interests, and, so far as the merits are affected, they must be regarded as the actual parties contesting the suit. Their acts and negligence must be regarded as the acts and negligence of the corporation. It was their duty to see that the case of the corporation was prepared for trial. If they were witnesses, it was their duty to attend, equally as if they were the actual parties. No service of subpœna could add to their duty to be present.

The cause was regularly set for trial on Friday, the twenty-ninth day of June, 1888, and was postponed until July 6 upon the application of the attorneys for the com-

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pany. The plaintiff at that time came from a distance with his witnesses to attend the trial, and was ready to proceed, and, as Samuel A. Murphy was not present, at the request of the attorneys for the company it was postponed until the next day. The next day the cause was called, and the said attorneys then stated to the court that they had given said Murphy notice, and they were in no position to ask for further indulgence or further delay, and made no request for any further postponement or further delay, in the trial, but they proceeded with the trial without objection, and cross-examined witnesses for the plaintiff.

It does not appear that any suggestion was made that either of the Murphys were witnesses in the case, or that they were desired as such. But in his affidavit for a new trial Samuel Murphy states that he is willing to be present as a witness and give his testimony. He may be regarded, then, in the light of a party who expects to establish his case by his own testimony.

The showing made by the two Murphys in their affidavits to excuse their negligence is very unsatisfactory, and to my mind insufficient. That of Samuel A. Murphy is especially evasive and indefinite upon material points. There is no dispute that the case was first set for trial on Friday, the twenty-ninth day of June. Was this the day Murphy swears he was in Buffalo? If it was, he says he went to Buffalo and returned the next day, ready to try the case, but it was postponed beyond the following day. He evades saying when it was postponed to. The return shows that it was postponed to the sixth of July, being one week. Did he know that the trial was set for July 6? He evades the admission of this fact, yet his attorney stated in open court that he had notified him of the fact, and it is a plain inference from the affidavit that he perfectly understood that it was set for trial that day, for he says that on Thursday morning he—

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"Arranged to go to Buffalo, and notified the company's attorneys of that fact, and requested them not to have the case passed. He was anxious to try it."

But instead of going to Buffalo he went to Chicago, arriving there Friday morning. He took no steps to notify his attorneys of his change of destination, but paid no further attention whatever to the case he was so anxious to try.

He returned home and arrived in Detroit Saturday morning, but made no inquiry of his attorneys or others as to what had become of the case which he requested them not to have passed on Friday, and which he was so anxious to try, but, according to his statement, went about his own business or the business of the company, doubtless considering it of more importance than the business of the court. He says he heard nothing further from his attorneys, and did not understand that the case would be called on Friday or Saturday. He certainly did not understand that it would not be called on Friday or Saturday. He had given orders not to have it passed. This president of the company gives us to understand that through his orders not to have the case passed his attorneys would hold the business of the court in abeyance, and the opposite party and his witnesses dancing attendance, while he was attending to his own or the company's business until he found leisure to attend the trial. He says—

"That, if such information was given him at the office of the company's attorneys, he misunderstood it."

There was no misunderstanding about it. He understood the case was set for Friday, and he requested the attorneys *not to have it passed.* They gave him no information that it would be called Saturday.

It is quite evident from the return that he did not inform his attorneys that he was going to Buffalo. They expected him to be present at the trial, and, because he was not, asked a postponement one day. They evidently made inquiries, and gave notice to Thomas Murphy, the treasurer of the

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company, as appears from the dispatch sent by him to Buffalo. Whose fault was it that the dispatch was not received? It was Samuel A. Murphy's, the president of the company. If he had intended to delay the case, and prevent it from coming to trial on the ground of an absent witness, and compel Mr. McMorran to again bring his witnesses from Port Huron, he could not have acted more effectually to accomplish such result, if his attorneys could have held the case open on his account.

The affidavit of Thomas Murphy shows that he, too, was an important witness. He knew that the president was absent, and, instead of attending the trial, he, too, on Friday night, went to Chicago *on his own business.*

So it appears that this president and treasurer of the corporation regarded their own business of more importance than proceedings in court of which they had full control. It does not help the case to call these persons merely witnesses. If they were merely witnesses the corporation was inexcusably negligent in not having secured their attendance by subpœna. Courts have uniformly refused to grant new trials when such negligence appears.

In the case of *People v. Saginaw Circuit Judge,* this Court held that the discretion exercised by a circuit judge in opening a judgment by default was like the discretion exercised in granting a new trial.

In *Hays v. Bank of the State,* 21 Ind. 154, it was held that pressing business engagements were not sufficient excuse, on a motion to set aside default.

In *Macomber v. Mayor, etc.,* 17 Abb. Pr. 36, it was held a default should not be set aside unless there was a meritorious defense, *and* the omission was the result of accident or mistake without culpable negligence.

In *Jarvis v. Worick,* 10 Iowa, 29, it was held that a default will not be set aside when the defendant's excuse really admits a want of diligence in preparing his case. See, also,

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Edwards v. McKay, 73 Ill. 570; *Leather Co. v. Woodley*, 75 Id. 435; *Schroer v. Wessell*, 89 Id. 113; *Thatcher v. Haun*, 12 Iowa, 303.

A plainer case of fault and inexcusable negligence on the part of a party having control of a cause in court cannot well be imagined.

Besides, the facts upon which Samuel A. Murphy seeks to exculpate himself are contradicted in material points by the affidavits of two persons. The circuit judge was called upon to pass upon and weigh the evidence produced before him upon the motion, and, when *that* is the case, courts exercising a supervisory jurisdiction have hitherto refused to interfere by *mandamus* with the discretion of the trial court.

In *King v. Justices of Devon*, 1 Chit. 34, the court refused to compel a quarter sessions to enter continuances, saying:

"Although our powers are great, they are not unlimited; they are bounded by some lines of demarcation. I am not aware that we have any power to interfere with the jurisdiction of the court below in the way suggested."

In the case of *King v. Justices of Middlesex*, 4 Barn. & Ald. 300, Abbott, C. J., said:

"There is not an instance which can be cited where the court have granted a *mandamus* to justices to compel them to come to any particular decision."

So, in *U. S. v. Judge Lawrence*, 3 Dall. 42, which was an application for a *mandamus* to compel Judge Lawrence to issue a warrant to apprehend Captain Barre, the Supreme Court of the United States said:

"We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident that the district judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre, and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a judge to decide according to the dictates of any judgment but his own."

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And in *Ex parte Hoyt*, 13 Pet. 279, 290, Mr. Justice Story, speaking for the Court, said:

"It has been repeatedly declared by this Court that it will not by *mandamus* direct a judge what judgment to enter in a suit, but only will require him to proceed to render judgment."

In *Insurance Co. v. Adams*, 9 Pet. 602, Chief Justice Marshall cites with approval the language made use of in the opinion given in the same case, reported in 8 Pet. 291, viz.:

"On a *mandamus* a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case require the inferior court to decide."

To the same effect are: *Com. v. Judges, etc.*, 3 Bin. 273; *Com. v. Cochran*, 5 Id. 103; *Roberts v. Holsworth*, 10 N. J. Law, 58; *County Court v. Daniel*, 2 Bibb, 573; *Chase v. Canal Co.*, 10 Pick. 244.

The cases in which this principle is asserted might be extended almost indefinitely from the earlier cases above cited to the present time, embracing the courts of every state and country exercising jurisdiction over English speaking people. It seems to me that if all of our own decisions upon this question are to be overruled, and the principles so universally and uniformly declared and acted upon by other courts are to be disregarded, the inconveniences and mischiefs of introducing and acknowledging this practice ought to have some weight in inducing us to stand by our former decisions.

This Court is not instituted for the purpose of investigating facts in cases at law; nor is it a court of original jurisdiction in equity. If the application for a *mandamus* to compel a circuit judge to grant a new trial can be entertained in this Court, it will be no longer necessary to resort to bill in equity for that purpose, and we will find ourselves investigating facts and weighing evidence as a court of original juris-

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diction in order to review and reverse the judgment of a trial court, a practice never contemplated and never authorized by the Constitution and laws of this State. If this Court assumes the authority to correct and overrule the discretion of the inferior tribunals in the granting or refusing of new trials, it is difficult to perceive why every case may not be reviewed upon *mandamus*.

There is nothing peculiar in the circumstances of this case, unless it be the confessed fault of the petitioner in not being at the trial, that distinguishes this case from any other when a new trial is desired, and the result would be that this Court would be overrun with motions for *mandamus*, and the time of the Court taken up in the disposition of cases where we will measure our discretion with that exercised by the circuit judges; and if we find they are not quite as broad as our own, we will overrule and set them aside.

It is gravely claimed that the circuit judge in this case abused his discretion, and therefore exercised none. We have seen that there was evidence for him to pass upon, and that the evidence showed a plain case of negligence, for which no sufficient excuse was given; but it is not our province to pass upon the sufficiency of the excuse; that was for the circuit judge to decide. The exercise of an honest judgment, however erroneous it may be, is not an abuse of discretion. Simply to assert that a judge has *abused* his discretion is merely to apply an epithet without defining the act. Advocates of the doctrine of the right to interfere by *mandamus* in matters of discretion usually assert that the abuse must be gross and palpable, so that the decision can be only explained as the result of caprice, passion, or partiality.

No man can review the facts of this case and say with any honesty of intent that Judge Gartner, in denying the motion for a new trial, acted either through caprice, partiality, or passion. When an exercise of discretion shall be influenced by such causes, and brought to my attention, I shall be ready

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to apply the corrective authority which we have to prevent injustice. Until then I must signify my satisfaction with the former decisions of this Court upon the practice.

One other point, not appearing in the record, but urged upon our attention with great force by the attorney of the petitioner, demands a passing notice. While admitting that there was fault upon the part of the company, yet he urged that the judgment of $1,000 was too great a fine to be inflicted on the corporation for the default of its officers. He announced his willingness to pay any reasonable sum imposed as terms, but insisted that $1,000 was too much. While admitting the force of this argument as *tending to influence our discretion* in opposition to that of the circuit judge, and excite our sympathy for his unfortunate client, yet I must suggest that such considerations have no legitimate place in the argument of the question. The fact that a judgment is obtained for or against a party who moves for a new trial has no bearing upon the question whether the judge has abused his discretion in granting or refusing the motion. In *Ex parte Whitney*, 13 Pet. 404, Justice Story said:

"A writ of *mandamus* is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party."

These considerations appealed as strongly to the conscience of the Court in the cases of *Miller v. Morse*, 23 Mich. 368, and *Gray v. Barton*, 62 Id. 186 (28 N. W. Rep. 813), where judgments were obtained by fraud and false swearing, as was alleged, for nearly as large and a larger amount than this, and yet this Court refused to grant new trials, notwithstanding, because of the negligence of the parties, which had been passed upon and ruled against them by the trial court.

I think the writ of *mandamus* should be denied.

MORSE and LONG, JJ., concurred with CHAMPLIN, J.

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SHERWOOD, C. J. Henry McMorran obtained a judgment against Samuel A. Murphy in the Wayne circuit, and garnished the First National Bank of Detroit.

The bank filed an answer in the garnishee proceedings, stating at the time the writ was served it had in its possession $984.65, and that petitioner claimed the money.

Petitioner was thereupon ordered by said circuit court to appear and interplead, and complied with the order. The cause came on for trial in July, 1888. Murphy was petitioner's main witness, and it failed to secure his attendance, and postponement of the trial was had until the next day, and, petitioner being then unable to produce the witness and make its proofs, judgment was taken against petitioner, and time allowed it to move for a new trial, which motion was duly entered, heard by the court, and denied.

This Court is now asked to issue a writ of *mandamus*, requiring the circuit judge to grant the new trial and set aside the order denying same.

The affidavits accompanying the relator's petition show that S. A. Murphy was the president of petitioner; that the money in the bank garnished was owned by relator, and should have been deposited to its credit, at the time the writ of garnishment issued.

It further appears from the affidavit of S. A. Murphy that defendant was anxious to try said cause, and that the reason the witness was not present to give his testimony when the cause was tried was because of his not receiving telegrams from his attorneys, and a misunderstanding between him and them as to the time when it would be necessary for him to be in court. This fact is not denied by the answer of the respondent.

If what is stated in the petition and accompanying affidavits, and not denied by the respondent, is true, the judgment against the petitioner ought never to have been rendered, and it should not be deprived of the right to make such show-

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ing upon a trial of the case, where it may be permitted to give all its testimony in evidence, unless it has wantonly or contemptuously abandoned the cause, which does not appear to have been done in this case.

I think the circuit court should have granted, upon proper terms, the petitioner's motion for a new trial, and the *mandamus* ought to be granted as prayed, but upon the terms of payment of costs in this Court and at the circuit to the present time.

It is said that a new trial in this case was not a matter of right, but was within the discretionary power of the circuit court; that the circuit judge exercised that discretion, and that this Court cannot now review it; that such is the tenor of all the decisions in this country and in England; and that to hold otherwise would not only necessitate the overruling of all the decisions upon the subject, but would bring into this Court a class of cases never before known in courts of last resort, exercising only an appellate jurisdiction.

This is clearly a mistake, and no other authorities need be cited than those referred to in my Brother CHAMPLIN'S opinion given in this case.

The discretion vested in the circuit court in this matter is a legal one, as all the authorities concede. Now, what is understood by legal discretion? Certainly it is not an arbitrary one. When exercised arbitrarily by a court it becomes an abuse of legal discretion. It must be conceded that the circuit court has no right or power to exercise its discretion in any such way, and whenever it does it is the right of any injured party to have the case reviewed in the appellate court, and have the injustice corrected.

A legal discretion is one that is regulated and governed by well-known and established principles of law. It can never be used or invoked to destroy nor to deprive a party of his property rights. Those are absolute, and no court is vested with the power to destroy these, nor to deprive a party of

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them, except as public necessity may require; and that is not this case.

Legal discretion can only be exercised in securing to a party his absolute rights and in their protection in some way; and when the discretion of a court is used for any other purpose, it becomes arbitrary and oppressive, and can never be regarded when so used as anything but an abuse of discretion, which is itself a violation of the law, both tyrannical and intolerable.

Where a party by a suit in a court seeks to enforce any of his absolute rights, or when such rights are assailed in a court of justice, and he has been summoned in to protect them, and he has not taken the proper means for such purpose, or if such means have been resorted to, and he has been negligent in enforcing them, the court cannot impose, as a penalty for such mistake or neglect, the destruction of such rights in granting relief, but may subject the careless or negligent party to such reasonable terms as will save the adverse party harmless in the premises, and at the same time save to the former his rights that are being enforced or protected if attacked, and in doing this the court may exercise a reasonable discretion, but beyond this the court cannot go, without subjecting his action to review in the appellate court. It cannot assume, in addition to the power thus given, the right to destroy or withhold the very right the discretionary power was given to enforce or protect.

Any other rule than the one herein indicated would place the absolute rights of every individual, when an attempt is made to enforce or protect them in a court of justice, at the arbitrary will or caprice, it may be, of the judge who may at the time be hearing the case. I know of no case recognized as law going so far, and if one can be found I have no hesitation in saying its authority should be disregarded. If what is claimed in this record on the part of the relator is true, and for the purpose of disposing of the question raised it

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must be so regarded, by the action of the circuit judge, relator has been irrevocably deprived of its property to the extent of over $1,000, if that action is to stand, and this, we are told, is no more than the exercise of a sound, legal, discretion, arbitrarily conferred upon the circuit judge. With my understanding of the law I can never give my assent to such a doctrine.

It is not, as is supposed, the right to the $1,000 that relator asks as favor of the court to protect. This it demands as its right. But the favor it asks of the court, and which the court has the discretionary power to grant, is that the terms to be imposed for its neglect in making good its defense at the first opportunity presented shall not exceed those necessary to save harmless the opposite party, and upon these terms I think the motion for a new trial should be granted, and that the writ should issue to that effect.

CAMPBELL, J. If the policy of this State had not become fixed in favor of resorting to motions for new trial in all cases, in preference to bills in equity, there would be force in the suggestion that the remedy should be sought in that way; and it is undoubtedly true that in the cases where equity did not exercise jurisdiction, and which usually involved a knowledge in the circuit judge depending on his attendance upon the trial, and seeing and hearing witnesses, and obtaining an acquaintance with matters not as well intelligible by others, the exercise of his discretion cannot generally be reviewed. But when a bill in equity would lie, its decisions were appealable as in all other cases, and to compel a party to resort to a motion, and then deny him resort to an appeal, would be to deprive him of a valuable right. This case is one which would come within the jurisdiction of equity, had that jurisdiction been retained, and, this being so, I think this Court has power to review it, and *mandamus* is the only remedy for that purpose.

I concur with the Chief Justice.

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CLARENCE B. WARDLE, RECEIVER, ETC., v. GERTRUDE TOWNSEND.

Mutual fire insurance company—Constitutional law—Title of act—Receiver—Assessments to pay liabilities—Responsibility of members—Costs.

1. A title to an act which reads, "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," is sufficient to embrace, without particular mention, provisions for winding them up in case they neglect to perform their duties or exercise their powers, and embraces in the object expressed examinations by the Commissioner of Insurance, the appointment of a receiver, and the assessment of policy-holders to pay liabilities and expenses.
2. A receiver of a fire insurance company organized under Act No. 82, Laws of 1873, derives his authority to make assessments directly from the statute, and, while proper to ask the advice of the court, of which he is an officer, on an *ex parte* petition, the order obtained confers no additional authority, and, if he acts beyond or in contravention of the statute, his acts may be questioned the same as if no such order had been made.
3. Such assessments are not conclusive upon the members, and in a suit to recover same the statute makes the assessment *prima facie* evidence of the regularity and correctness of all proceedings, and of a right of recovery.
4. The underlying principle of *all* insurance is *complete* idemnity for all losses insured against, and is as applicable to *mutual* as to *stock* companies; the object of the statute authorizing the formation of the former being to substitute mutual responsibility for capital, and to limit the *price* of insurance to the actual cost of indemnity against *all* the risks of *all* of the members.
5. Parties taking insurance in a mutual company are presumed to do so with a full understanding of all the liabilities they assume by so doing, including that of making good deficiencies arising by reason of the non-payment of assessments by irresponsible members, or from other causes; and it is proper and necessary for a receiver of such a company to assess, in the first instance, a sufficient sum to pay all liabilities and expenses, and in ascertaining this amount he is invested with a liberal discretion, which will not be interfered with unless abused; and the Court

75	385
86	400
75	385
97	523
75	385
100	619
75	385
101	394
75	385
123	682
75	385
d141	678
75	385
145	430

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cannot say that an assessment of 100 per cent. in excess of the liabilities is not warranted, and made in good faith, without evidence that it is *unreasonable* and *excessive*.

6. In a suit by the receiver of a mutual fire insurance company organized under Act No. 82, Laws of 1873, to recover an assessment, costs follow the judgment, regardless of its amount.

Error to Ionia. (Smith, J.) Argued April 18, 1889. Decided June 21, 1889.

Assumpsit by the receiver of a mutual fire insurance company to recover an assessment. Defendant brings error. Affirmed. The facts are stated in the opinion.

A. V. Dodge, for appellant.

S. V. R. Trowbridge (*McGarry & Ford*, of counsel), for plaintiff.

CHAMPLIN, J. Clarence B. Wardle was appointed receiver of the Home Mutual Fire Insurance Company, of Ionia, Clinton, and Montcalm counties, a corporation organized under Act No. 82, Laws of 1873.

The defendant took insurance in this company, and received five policies, of the following dates: April 18, 1879; September 8, 1879; March 25, 1882; another one of the same date; and one August 25, 1882.

The company had suffered losses which it neglected to pay; and on the nineteenth of February, 1884, the Commissioner of Insurance, acting under the authority conferred by section 15 of said act, made an examination into its affairs, and found and determined that the company was insolvent, and took proceedings under the statute to wind up the business of the company.

On the thirtieth day of April, 1884, the commissioner filed his petition, under section 15 of the act, and thereupon such proceedings were had that afterwards, and on the twenty-sixth day of May, 1884, the plaintiff, Clarence B. Wardle,

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was appointed receiver, and qualified. At the time he was appointed there were losses and liabilities of the company amounting to $22,000, not including the expenses of the receivership, and there were many suits pending to recover losses unliquidated and undetermined. Many former policy-holders had left the country, many others were entirely irresponsible, and of the others a large part had surrendered their policies.

The receiver proceeded to assess upon all the members and persons insured in the company an assessment for the purpose of paying the liabilities and expenses; and, in determining the aggregate amount which it was necessary to assess, the receiver took the advice of the circuit court, filing therein a petition, in which he represented that the debts of the company, and interest on the same, amounted to about the sum of $25,000, not including some unadjusted claims on which payment may be enforced; that many of the debts were unliquidated, and it was impossible for him to know what would be paid on the same; that, owing to the way the books had been kept, there might be names in said books which should have been dropped from the same, by the surrender of the policies or the sale of property or otherwise; that the assessment should be large enough to cover all contingencies, avoiding, if possible, the necessity of a second assessment, and the expense thereof, and that in his opinion $50,000 should be assessed to raise the said sum of $25,000, and that he believed such assessment would not yield more than the sum of $25,000, which belief was founded on the knowledge he had in regard to the accounts of the company and the condition of its affairs; that it was impossible to state what his expenses would be, or how long it would take to wind up the company, or how many policy-holders would pay or how many would contest their assessment.

Upon hearing the petition *ex parte*, the circuit court made a formal order granting the prayer of the petitioner, and

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authorizing him to assess upon the policy-holders $50,000 for the purposes stated in the petition. Thereupon, in accordance with said act and the order, the receiver did make such assessment. The amount assessed against each member of the company was in proportion to the amount of insurance of such member, and his interest in the company, in no case assessing any policies for losses which occurred while such policies were not in force, but holding members liable for all losses which occurred while they were members of such company.

The circuit court found as a fact that, in the judgment of the receiver, after a thorough and careful examination of and inquiry into the affairs of the company, and after collecting from the most available parties individual assessments thereunder, the said assessments when collected to the fullest possible extent will no more than realize the amount required to pay the actual liabilities of said company, and the reasonable expenses of said receivership.

In making the assessment, the receiver gave notice, as required by section 17 of said act, by publishing notices in the Ionia Sentinel, Clinton Republican, and Montcalm Herald, weekly newspapers printed in said counties, once a week for six successive weeks, wherein and whereby the aggregate amount assessed by said company was stated.

The foregoing statement contains substantially the facts found by the court.

The bill of exceptions contains only the defendant's requests for findings of law, and the findings of fact and law by the court.

Defendant's counsel requested the court to find the law as follows:

"*First.* That Act No. 82 of the Session Laws of 1873, entitled 'An act to provide for the incorporation of mutual fire insurance companies,' etc., is unconstitutional and void, for the following reasons:

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"1. The subject of the act embraces more than one object.

"2. The object of the act is not expressed in the title.

"3. It purports to authorize 'suits to be commenced in the circuit court for less than one hundred dollars.'

"4. It purports to authorize the service of process and the bringing of suits against the residents of other counties.

"*Second.* The assessment alleged to have been made by the plaintiff in this cause is excessive and void:

"1. Because the act in question does not authorize the levying of an assessment for overlays.

"2. Because, if it authorizes an assessment for overlays, the overlay covered by this assessment is grossly excessive, and therefore void.

"3. Because the order of the court assuming to authorize such assessment, being *ex parte*, is void.

"4. Because such assessment is made upon the basis that all persons insured, and members of said company at the time of each loss, were liable to assessment for all such losses, regardless of the fact that some of said policies had been surrendered.

"*Third.* The amount claimed by the plaintiff in his said declaration being less than one hundred dollars, judgment for costs cannot be rendered in favor of the plaintiff and against the defendant."

The circuit judge found the following as his conclusions of law:

"As to the first proposition of law submitted, I find it is not well taken; that the act referred to is not unconstitutional for any of the reasons stated.

"That the second proposition is not well taken; and the assessment was not, under the circumstances shown or admitted, excessive or void; and that the order to make the assessment could legally be made *ex parte;* and the assessment was made on a proper legal basis.

"And, further, the statute expressly authorizes costs to plaintiff, even though the recovery be less than one hundred dollars; section 17 of the act referred to expressly providing that 'upon such suit, such assessment shall be *prima facie* evidence of the regularity and correctness of all proceedings up to and including the assessment, and of the receiver's right to recover the amount therein, with costs.'"

And he directed a judgment in favor of the plaintiff for $32.84, with costs of suit, to be taxed.

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There is no valid constitutional objection to the title of the act.

A title to an act which reads—

"An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties,"—

Is sufficient to embrace, without particular mention, provisions for winding them up in case they neglect to perform their duties or exercise their powers. The examination by the Commissioner of Insurance, the appointment of a receiver, and the assessment of policy-holders to pay liabilities and expenses, are all necessarily incident to the object expressed in the title. There are no decisions of this Court which give countenance to the idea that subjects so germane to the act of incorporation should be expressed in the title. *Tolford v. Church*, 66 Mich. 431 (33 N. W. Rep. 913); *Attorney General v. Amos*, 60 Id. 372 (27 N. W. Rep. 571).

Nor is the body of the act in conflict with the constitutional provision that no law shall embrace more than one object, which shall be expressed in its title. The object is to provide for the incorporation of mutual fire insurance companies, and to define their powers and duties; and each provision of the enactment has reference to this object.

It is also claimed, in the brief of counsel for defendant, that the act is unconstitutional in providing for the appointment of a receiver without any adequate notice to the persons whose interests are to be affected by his appointment. This position is taken for the first time in this Court. It is not covered by his requests to the court to find on matters of law, and there is no assignment of error covering this point. We shall not pass upon the question, were it proper to do so upon this record, as the facts are not sufficiently stated to enable us to determine whether there was an appearance, and the parties were heard upon the motion or not.

The statute does not contemplate that the receiver shall

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obtain an order of the court to authorize him to make the assessment. He derives his authority directly from the statute. It is not, however, improper for him to ask the advice of the court, upon a showing by petition filed and heard *ex parte*, as he is an officer of the court; but the order confers no additional authority, and, if he acts beyond or in contravention of the statute, his acts may be questioned by parties injuriously affected by his unwarranted proceedings, the same as if the order of the court had not been obtained.

Assessments made *ex parte* by a receiver, or by a board of directors, are not conclusive upon the members. If not voluntarily paid, and a suit is brought to recover them, the statute makes the assessment *prima facie* evidence of the regularity and correctness of all proceedings up to and including the assessment, and of the receiver's right to recover therein the amount assessed, with costs. The question, therefor, whether the assessment against defendant was excessive, was open to the defendant, but the burden of proof was upon her to overcome the *prima facie* evidence made by the assessment itself.

The defendant's counsel insists that the assessment of $50,000 to meet liabilities of the company of $22,000, and the expenses of the receivership, exceeded all bounds of moderation and propriety, and invited the litigation it purported to provide against; that such assessment is rank injustice to the persons who are financially responsible, and could not have been contemplated by them when they entered into their contract of insurance; that the contract does not contemplate, and should not be construed or interpreted to include, the payment of the deficiencies of members who failed to pay.

The underlying principle of all insurance is complete indemnity for all losses insured against. This principle is as applicable to mutual as to stock companies. The statute providing for the incorporation of mutual insurance com-

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panies provides a scheme whereby a number of persons may become insurers of each other, so that each person insured will be entitled to full indemnity against loss to the amount of his insurance. The object of the statute is to substitute mutual responsibility for capital, and to limit the price of insurance to the actual cost of indemnity against all the risks of all the members. *Bangs v. Gray*, 12 N. Y. 480; *Savage v. Medbury*, 19 Id. 34.

To this end the statute (section 17) provides that, in case of insolvent companies, the receiver shall—

"Assess upon all of the members and persons insured in such company such sums of money as will, in the aggregate, be sufficient to pay all the losses and liabilities of said company, together with the services and expenses of such receiver, according and in proportion to the amount of their insurance or interest in such company."

The rights and obligations of the individual members are mutual, and each sustains a double relation to the corporation. As an assured he is entitled to be indemnified for his loss insured against by the corporation. As a member of the corporate body he, in consideration for this indemnity, agrees with the corporation, and with each member of the corporate body, to pay his just share or proportion of all losses, so that each member shall receive the same indemnity, and shall also pay his share of the expenses. Each member is authorized to bring suit upon his claim for losses, if payment is withheld more than 60 days after it shall have become due.

Parties taking insurance in a mutual company are presumed to do so with a full understanding of the liabilities they assume by so doing. It follows from the agreement that each member shall be paid the full amount of his loss insured against; that if, by reason of the irresponsibility of a member, or for other cause, the assessment laid upon him is uncollected or uncollectible, the responsible members must

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make good the deficiency; otherwise losses never would or could be paid in full where one or more members fail to pay, and the assessment is uncollectible, and every company would necessarily be insolvent at the first failure to collect. Hence it is that, in making assessments, investigation must be made, and allowances included, for non-payment by irresponsible members, as well as for the expenses of the proceedings. The assessment must be laid upon all the members liable for the loss, whether solvent or insolvent, in accordance with the proportion directed by the statute; and if only a sum equal to the liability and expenses were assessed, and some neglected to pay because insolvent, another assessment would have to be made to make up the deficiency; and if just the amount of the deficiency were again assessed, an insufficient amount would be realized for the same reason; and so the assessments might go on *ad infinitum;* and still there would remain a deficiency owing to the failure of the irresponsible ones to pay. Such a construction of the statute would be ridiculous. No person suffering a loss, where one or more members were irresponsible, would ever receive full indemnity; and the solvent members would be harassed, and their means be eaten up, with useless expense and litigation.

It is therefore proper and necessary for the receiver to assess a sufficient sum in the first instance to pay all liabilities and expenses; and, in ascertaining this amount, he is invested with a liberal discretion, which will not be interfered with unless abused. *Jones v. Sisson,* 6 Gray, 296.

In support of the claim that the assessment in this case is excessive, counsel for defendant cites us to the case of *People's Insurance Co. v. Babbitt,* 7 Allen, 235. In that case the court held that the board of directors were vested with discretionary authority in fixing the rate at which members were to be assessed, with a view to raising the amount necessary to supply the existing deficiency of funds. It held that the actual amount so required could be ascertained and deter-

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mined with exactness and certainty; and Merrick, J., in his opinion says:

"But as there must be expense incurred in the collection, and losses may be sustained in consequence of the insolvency of members assessed, all of which is unavoidably contingent and uncertain, proper allowances may be made for the failures which may be expected to result from these or other unforeseen causes; and if such allowances are reasonable in amount, and consistent with good faith on the part of the directors, they will not vitiate the assessment. * * * But, if these reasonable limits are disregarded and transcended, the directors will have acted without warrant or authority, and any assessment so made by them will be illegal and void."

In that case two assessments of 10 per cent. each were laid. Upon the first the assessment was $11,414, to meet a liability of $4,666.81, and the other was an assessment of $11,732.66, to meet a liability of $5,616.68. Upon the testimony of experts examined as witnesses it was shown that at least 50 per cent. of the amount assessed might be expected to be collected under circumstances the most unfavorable of any to which they had adverted, and the court said:

"No circumstances are shown to justify the great excess in the amount attempted to be raised by the assessments which the plaintiffs now seek to enforce, and there is therefore no principle upon which they can be upheld or maintained."

This case, so far as it restricted the right to assess members in a solvent company to a sum sufficient to pay existing liabilities and expenses, and denied the authority to lay an assessment for the purpose of accumulating a fund in a solvent company, is overruled by the case of *Com. v. Dorchester Insurance Co.*, 112 Mass. 145. As applied, however, to an insolvent corporation, whose affairs are being wound up by a receiver, the principles laid down for which assessments may be made are correct. *Traders' Insurance Co. v. Stone*, 9 Allen, 483.

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In Massachusetts and other states where the question of excessive assessments has arisen, the burden of showing the reasonableness of the assessment, and the regularity of the proceedings upon which it is based, is upon the party seeking to enforce it; but under our statute, as before stated, the burden of proof is upon the party who contests the assessment to show its invalidity. The presumption is in favor of the action of the receiver, and we cannot say that an assessment in excess of the liabilities of 100 per cent. is not warranted, and is not made in good faith, without evidence which shows that such assessment is unreasonable and excessive. There is no testimony in the record, and no finding of the court, which tends to establish the position contended for by the defendant. We have no means of ascertaining how many of the members are responsible, and how many are not, nor the amount of insurance.

This is an insolvent company, and there must be some (but what proportion we are not informed) against whom assessments cannot be enforced; and it may be, for all that appears in this record, that the assessment is reasonable and proper. It is the duty of the receiver to endeavor to collect the assessment against every member, but to what extent he must pursue his legal and equitable remedies is not before us for decision.

The statute makes every assessment a lien upon the property insured to the amount of the assessments, costs, and interest due thereon. Section 12. How and by whom such lien should be enforced are interesting questions, which we are not called upon at present to decide.

The assessment appears to have been made upon the proper basis. The court finds that the amount assessed against each member was in proportion to the amount of insurance of such member and his interest in the company, in no case assessing any policies for losses which occurred while such policies were not in force, but holding members liable for all

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losses which occurred while they were members of such company. This is the basis established by the statute, and is also the contract of the parties composing mutual insurance companies in this State. *Russell v. Berry*, 51 Mich. 287 (16 N. W. Rep. 651); *Bangs v. Gray*, 12 N. Y. 477.

Costs were properly awarded to the plaintiff, although the sum recovered was only $32.84.

The statute authorizes the receiver to bring his action to recover assessments in the circuit court without regard to the amount claimed, whether more or less than $100, and to recover costs. If he could not recover costs unless he recovered a judgment of $100, but must pay costs if his recovery is less, we should have the absurd spectacle of a recovery, by a receiver, of amounts varying from a few dollars up to one hundred, and being obliged in a majority of cases to pay twice or thrice the amount of costs which he recovers judgment for; and, as this is part of the expenses of the receivership, he would then make another assessment to cover these expenses, which he might again sue in the circuit court, and recover a judgment in his favor for the assessment, and a recovery would be had against him for costs; and so he might keep on until the resources of the members were exhausted, at the game of shuttle-cock and battle-door,—paying and recovering costs.

The question is foreclosed by the case of *Bacon v. Clyne*, 70 Mich. ——(38 N. W. Rep. 207), to which we adhere.

The judgment of the circuit court must be affirmed.

SHERWOOD, C. J., CAMPBELL and LONG, JJ., concurred. MORSE, J., did not sit.

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RALSTON A. BUCK v. THE ESTATE OF LUCY HAYNES, DECEASED.

Witness—Facts equally within knowledge of deceased person—Assignment of claim—Evidence—Promise of married woman—Statute of frauds.

1. The assignor of an account filed against the estate of a deceased person may be asked on cross-examination the purpose of such assignment, and, if shown to have been to make him a competent witness, he cannot testify to the account, if otherwise competent.[1]
2. The promise of a married woman to pay for medical services rendered to her husband is not binding, it not being a contract relating to or benefiting her separate estate.
3. The *verbal* promise of a widow to pay a physician's bill against her husband is void under the statute of frauds. *Ruppe v. Peterson*, 67 Mich. 437.

Error to Clinton. (Smith, J.) Argued April 18, 1889. Decided June 21, 1889.

Claim filed against estate of deceased person, and allowed in part in probate and circuit courts. Claimant brings error. Affirmed, with costs, including $25 for vexatious appeal. The facts are stated in the opinion.

Fedewa & Lyon, for appellant.

John G. Patterson and *H. & H. E. Walbridge*, for estate.

LONG, J. Claimant purchased an account against Lucy

[1] Act No. 139, Laws of 1885, provides that the words "opposite party," as used in How. Stat. § 7545, shall be deemed to include the assignors or assignees of the claim, or any part thereof, in controversy, and in *Stackable v. Estate of Stackable*, 65 Mich. 518, the Court held that the object of this amendment was to prevent the common practice of a claimant against an estate assigning his claim, and thereby becoming eligible as a witness, and defeating the spirit and intent of the original statute.

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Haynes, deceased, from Dr. Geo. E. Bliss, which was filed in the probate court as a claim against her estate, May 3, 1888.

The account, as claimed, amounted to $97.75, and was for the services of Dr. Bliss as a physician during the sickness of Mrs. Haynes and her husband.

The claim was allowed at $4.50 in probate court, and claimant appealed to the circuit court, where judgment was entered in his favor for $5.75. He now brings the case to this Court by writ of error.

On the trial Dr. Bliss, the assignor of the account, was produced as a witness by the claimant, and testified that he knew Mr. and Mrs. Haynes in their life-time; that Mr. Haynes died May 15, 1885, and Mrs. Haynes died in June or July, 1887; that he is a physician, and rendered services as such to Mr. and Mrs. Haynes before their death; that he had an account against Mrs. Haynes for such services, and sold it to Mr. Buck, the claimant, and that he then had no interest in the claim.

Witness further testified that, upon one of his visits to Mr. Haynes, Mrs. Haynes told him:

"I want you should attend to him, and do the best you can for him, and I will pay you after harvest."

That he attended him until he died, and during that time he furnished medicines to Mrs. Haynes as well as her husband; that on the eighteenth day of May, after her husband died, he furnished medicines to Mrs. Haynes, when she promised to pay the bills for attendance upon her husband; that on June 24 and July 15 he furnished her medicines, and that she died on the sixteenth day of July, that the whole bill amounted to $97.75, and he had not been paid any part of it.

On his cross-examination, the witness was asked the purpose of his assigning the account to Mr. Buck, and if it was so he could be a witness to prove the account,—if that was not the purpose of the assignment,—and answered:

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"I calculated it would leave me free, and I could be a witness if it was necessary."

The court permitted this answer to be given, under objection of counsel for claimant. Error is assigned upon this ruling. All the other assignments of error relate to the charge of the court.

The court was not in error in permitting this question to be answered. If the assignment was only made for this purpose, then Dr. Bliss was not a competent witness to testify to the account, even if he was competent to testify under any circumstances to matters which were equally within the knowledge of the deceased.

It is claimed, however, that, counsel for the administrator not having made objection to the competency of the witness on the ground that the matters to which he was testifying were equally within the knowledge of the deceased, therefore this objection was waived, and the witness could not be questioned as to his motive in making the assignment. The very purpose of the inquiry, however, was to show that the assignment was only colorable, and that he still had an interest in the account, and therefore he was incompetent to testify in relation to it. The court very properly received the evidence.

Error is assigned upon the following portions of the charge of the court:

"As to the medical services of $15 up to April 4, 1885, I think that need not be considered by you. I don't think the plaintiff can recover for that time. I don't think the evidence would authorize a recovery for that. * * *

"Now, had Dr. Bliss been the claimant here against the estate of Mrs. Haynes, he could not have testified to the conversation between herself and him, because that would have been equally within her knowledge. Inasmuch as she is dead, and cannot testify in relation to that matter, the law would not permit him to testify. * * * * *

"There is some testimony here as to some interest that the doctor has taken in this case. Now, if from this testimony you think that this assignment is only colorable, and the

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doctor is the real party in interest, then I think his evidence as to the conversations between himself and Mrs. Haynes ought to be stricken out of this case, and ought not to be considered."

Error is also assigned upon the remark of the court, in answer to an inquiry from one of the jurors, as follows:

"It seems that in the probate court only $4.50 was allowed, but now, as it stands here, I charge you that it should be $5.75."

We see no error in this charge of which the claimant ought to complain. If any error was committed by the court, it was not such as prejudiced the rights of the claimant. The matter was left to the jury to say whether Dr. Bliss had any interest in the claim, and, if they found he had no interest in it, then they might consider his testimony as relating to the whole account, except the $15, which the court struck out; that being the items of the account for services rendered Mr. Haynes before the time of the claimed arrangement with Mrs. Haynes, that she was to be responsible for the bill for future services. Under the undisputed facts in the case, however, all but the $5.75 was for services rendered Mr. and Mrs. Haynes before the death of the husband, and the most of it for services to the husband.

The claimant claimed to recover under an express contract made with Mrs. Haynes to become responsible for this personally, and seeks to charge it against her estate under this contract. She could be bound by no such contract. At the time it was made, if made at all, she was a married woman. It was not a contract relating to her separate property, and her separate estate was not to be benefited by it. It was the debt of the husband, and she could not be made liable out of her separate estate by a promise to become surety for its payment, and her promise, if any was made, after her husband's death, to pay it, would not be binding upon her. It was the promise to pay the debt of another person, not made in writing, and wholly without consideration.

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Under the circumstances here shown from the testimony of the doctor himself, clearly he was not a competent witness to prove such a contract, or to prove the account. This part of the case should have been taken from the jury.

What service he rendered Mrs. Haynes after the death of her husband he could recover for, but he was not a competent witness to prove that part of the account, even.

If either party had cause to complain of the ruling of the court, it was the administrator and those interested in the estate, and not the claimant.

The judgment of the court below must be affirmed, with costs.

We think this appeal is vexatious, and, in addition to the taxable costs allowed, the administrator will recover against the claimant the sum of $25.

The other Justices concurred.

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FANNY NEWMAN v. GUSTAVE STEIN.

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Action for slander—Evidence—Damages—Malice.

1. In an action for slander, the burden is upon the plaintiff to prove the utterance of the slanderous words *substantially* as charged in the declaration, but this rule does not exclude proof of the balance of the conversation.

   So *held*, where the words spoken imputed a want of chastity to the plaintiff, and were claimed by defendant to have been spoken of and concerning her sister in an altercation with plaintiff and her mother.[1]

2. The jury in a slander suit may consider in mitigation of damages evidence showing that the plaintiff provoked the defendant to utter the words charged as slanderous.

3. In actions for slander, where the words are not actionable *per se*, the plaintiff must allege and prove that he has sustained some damages of a *pecuniary* nature, but, if actionable in themselves, no *special* damages need be alleged or proved, and the jury may give such damages as shall compensate the plaintiff for the wrong and injury done, the amount depending upon the circumstances of each case.

4. Under an allegation, in a declaration for slander, "that the said plaintiff is greatly injured in her good name, fame, credit, and reputation," punitive or exemplary damages[2] may be awarded, if *express* or *wanton* malice is shown, and in case of *actual malice the jury may always* give such damages.[3]

Error to Kalamazoo. (Buck, J.) Argued April 19, 1889. Decided June 21, 1889.

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[1] See *Brown v. Barnes*, 39 Mich. 212, 218, where the declaration alleged that defendant had charged plaintiff, in conversations referred to, with larceny and perjury, and there was testimony of the various forms of the charge, and in some instances with additional particulars, and it was held no variance unless in some way repugnant or changing the same.

[2] See *Ross v. Leggett*, 61 Mich. 445 (head-note 8), for definition of this kind of damages.

[3] See Act No. 229, Laws of 1889, as to damages in actions for libel.

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Case for slander. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Hampden Kelsey, for appellant.

Howard & Roos, for defendant.

LONG, J. Plaintiff recovered six cents damages in an action on the case for slander against the defendant in the Kalamazoo circuit court, and brings the case to this Court by writ of error.

It appears that the plaintiff, who is 25 years of age, and a single woman, lived with her mother, Mrs. Newman, and a little nephew, on an adjoining lot to the defendant in the city of Kalamazoo.

The defendant is a married man, his wife and several children constituting his household.

On July 10, 1887, some difficulty arose between the two families during the absence of the defendant. On his return in the evening he found his daughters in tears, and then learned from his family that the plaintiff, in an altercation about the children, who were playing on the sidewalk, had called his wife and daughter some vile names, when he at once stepped out of his door and to the fence between the two places, and called to the plaintiff, who, with her mother, went out to the fence, where the defendant was standing. Here it is claimed by the plaintiff the defendant applied to her several vile and opprobrious epithets, imputing to her a want of chastity, in the presence and hearing of a large number of people.

On the trial the defendant did not attempt to justify the speaking of the words, either by his plea or in his testimony, and there is no dispute in the record but that the character of the plaintiff is above reproach.

The defense set up was that the plaintiff had only a short time previous, and on the same day, applied several names to

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the wife and daughter of defendant imputing to them a want of chastity; that this grew out of a quarrel with the children, in which the little nephew of the plaintiff was involved; that defendant, coming home, and learning of the transaction, and while angry from its repetition to him by his family, went out and called the attention of the plaintiff and her mother to what had been told him by his family.

It is claimed by the defendant that the plaintiff did not deny the charges made by him, but reiterated the statements; and that, when he spoke the words imputed to him by plaintiff, he did not speak them of and concerning the plaintiff, but that all the words spoken by him had reference to a sister of the plaintiff, the mother of the plaintiff's little nephew, who was not present there.

Upon the issue so made the court submitted the case to the jury, instructing them, among other things, as follows:

"If you are satisfied by a preponderance of evidence in the case, that the language charged in the declaration, or any part of it, was used towards the plaintiff by the defendant, it imputed to her a want of chastity, and the words would be actionable in themselves, * * * and entitle the plaintiff to recover. * * * If they were spoken of and concerning plaintiff's sister and not of the plaintiff, then the jury must acquit."

The contention of counsel for the plaintiff is that, while the plaintiff was on the witness stand, being examined as a witness in her own behalf, the court ruled out a portion of her testimony; that this testimony was competent for the purpose of showing that it was the plaintiff to whom the defendant addressed his words, and not of her sister. The plaintiff testified:

"I heard him say if the God damned bitch comes out here I will tell her what she is. He was looking at me when he said that. I stepped out on the porch, and said: 'Mr. Stein, are you talking about me? If you are, anything you say about me I will make you prove.' He said: 'I will, and I can,—every word of it.' Then I stepped out. He called

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me over to the fence. He told me to come over to the fence, and he would tell me what I was. I went over to or near the fence. He next said: 'It ain't forgotten what you did at Rome City. The conductor that had you out on the island all day is right here. He will prove it, and so will I.'"

Here the witness was interrupted by defendant's counsel by the claim that this was not under the issue made, and this part of the testimony of the plaintiff was stricken out under such objection, to which counsel for plaintiff excepted.

It appeared that no such charge was made by the declaration, and for that reason the testimony was excluded by the court.

Plaintiff's counsel contends, however, that if he had been permitted to show the whole conversation, and his charge against the plaintiff at Rome City, on the train, and other instances which could have been given, it would have convinced the jury that the plaintiff was the one of whom he spoke the words charged in the declaration, and no other person, as the defendant testified that he had not seen the sister for seven or eight years.

I think that the testimony was competent. The plaintiff should have been permitted to give the whole conversation, and all the words spoken by the defendant to her there. It was a part of the same transaction, and led up to the words charged in the declaration to have been spoken by defendant of and concerning the plaintiff.

The burden was on the plaintiff to prove substantially that the defendant spoke the words as charged in the declaration. This would not, however, exclude other words spoken there in the same conversation. *Brown v. Barnes*, 39 Mich. 211.

These other words would not make out the cause of action, but the whole conversation may properly be given, and in this instance it would have had a tendency at least to contradict the theory and claim of defendant that the words charged in the declaration were not spoken of and concern-

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ing the plaintiff. We think the court was in error in excluding this testimony.

Mrs. Clarinda Newman was called as a witness for plaintiff, and testified to what the defendant said about the plaintiff being at Rome City. This the court, at the request of counsel for defendant, also struck out. We think this was error. This testimony was competent, for the reason given as to the testimony of the plaintiff.

Claim is also made by counsel for plaintiff that the court was in error in permitting the defendant to testify that he was made angry by what his children said to him in regard to the language used to them by plaintiff, and their mother, and that the court was also in error in its charge to the jury, that, if the plaintiff provoked the defendant to utter the words by language used towards his daughters, they should consider that fact in mitigation of damages. In this there was no error. The law makes allowances for the infirmities of human nature, and for what is done in the heat of passion, produced by the improper conduct of the adverse party. *Ritchie v. Stenius*, 73 Mich. —— (41 N. W. Rep. 689).

Counsel for plaintiff also complains in his brief of the charge of the court on the question of damages. The court instructed the jury:

"This is not a case where exemplary or punitive damages can be given."

This was error.

In actions for slander, where the words are not actionable *per se*, the plaintiff must both allege and prove that by reason of the words he has sustained some damages of a pecuniary nature.

In such actions, where the words are actionable in themselves, no special damages need be alleged or proved, and the jury are warranted in giving such damages as shall compensate the plaintiff for the wrong and injury done. What

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amount of damages may be given depends upon the circumstances of each particular case.

Under proper pleadings and proofs the plaintiff may recover damages for all actual loss and injuries sustained, including mental suffering and discomfort arising from the public disgrace and indignity caused by the slander. Field, Dam. § 691.

The allegation and claim of damages in the declaration in the present case is—

"That the said plaintiff is greatly injured in her good name, fame, credit, and reputation."

Under such an allegation the jury would be warranted, if they found the defendant spoke, uttered, or published the words alleged of and concerning the plaintiff, in awarding punitive or exemplary damages, if the facts proved established express and wanton malice.

Where actual malice is shown in an action for slander the jury may always give exemplary damages. *Knight v. Foster*, 39 N. H. 576; *Guard v. Risk*, 11 Ind. 156; *Armstrong v. Pierson*, 8 Iowa, 29; *Daly v. Van Benthuysen*, 3 La. Ann. 69.

We think the court was in error in this part of its charge. The words charged to have been spoken were actionable *per se*, and, if the defendant was actuated by malice, and in a wanton manner intended to charge the plaintiff with being unchaste, then exemplary damages were recoverable. But if the defendant spoke the words in the heat of passion, provoked thereto by what plaintiff had said of his family, and which had been communicated to him as coming from the plaintiff herself, this would be evidence of the want of malice, and the jury should consider it in mitigation of damages.

For the errors pointed out the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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ERBIN RICHARDS v. SIMEON RICHARDS AND LORETTA RICHARDS.

Taxes—Tenant in common—Adverse possession.

1. An heir cannot set up an adverse claim to land of which his father died seized, under a tax title purchased after his death, and paid for by his grantor to protect his covenants of warranty, pursuant to an agreement made with the father in his life-time, under which deed the heir claims to hold *adverse* possession, such title belonging equitably to the estate.
2. A widow who has secured a conveyance from all the heirs but one of her husband's estate, and is in possession under such title and her dower and homestead rights, cannot acquire an adverse title as to such heir by purchasing an outstanding tax title paid for by her husband's grantor to protect his covenants of warranty, pursuant to an agreement made with the husband in his life-time, nor can her grantee, with knowledge of all of the facts, do so.[1]

Error to Kent. (Montgomery, J.) Argued April 19, 1889. Decided June 21, 1889.

Ejectment. Plaintiff brings error. Reversed, and judgment entered for interest claimed by plaintiff, and record remanded for further proceedings under the statute. The facts are stated in the opinion.

J. C. FitzGerald (*Francis A. Stace,* of counsel), for appellant.

Fletcher & Wanty, for defendants.

MORSE, J. This is an action to recover the equal undivided one-sixth of 40 acres of land in the township of Paris, Kent county.

[1] See *Cook v. Clinton,* 64 Mich. 309 (head-note 1), as to adverse claim by tenant in common under title acquired during such tenancy.

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The case was tried before Hon. R. M. Montgomery, judge of the Kent circuit court, without a jury, and judgment was rendered in favor of the defendants.

The finding of facts is substantially as follows:

October 16, 1875, one Erastus U. Knapp conveyed the 40 acres in question by warranty deed, containing full covenants of warranty, to Myron Richards, the father of plaintiff, and of defendant Simeon Richards. The defendant Loretta Richards is the wife of Simeon Richards.

Myron Richards at once entered into possession of the land, and occupied the same as his homestead until his death, January 1, 1877. He died intestate, leaving surviving him his widow, Eliza Richards, and six children, to wit, Erbin Richards, Truman Richards, Gilbert Richards, Simeon Richards, Martha McCormick, and Ann J. Forbes.

On the first day of March, 1877, all of the children except the plaintiff, Erbin Richards, conveyed all their right, title, and interest, as heirs at law of their father, to their mother, Eliza Richards.

In 1873 the land was sold for the unpaid taxes of 1872, and bid in by the State. This fact was unknown to both Knapp and Myron Richards when Knapp conveyed to Myron. Shortly before his death, Myron was informed of this outstanding tax title, and made application to Knapp to have the title perfected under the latter's warranty. Knapp directed him to procure the tax title to be conveyed to Myron, and he (Knapp) would bear the expense, but Myron died without having obtained it.

After Myron's death, Simeon Richards, who was living on the farm with his mother, and before the first of March, 1877, again applied to Knapp to secure this tax title. Thereupon Knapp made an arrangement with Simeon by which it was agreed that said title, then appearing in the State of Michigan, should be acquired, and Knapp would pay the expense. Under this arrangement a deed of the land

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was procured from the Auditor General to Eliza Richards, and after it was obtained Knapp paid to Simeon, or his mother, the money expended to acquire such title. This deed was dated March 1, 1877, and recorded on the nineteenth day of the same month. This tax deed was shown to be void on the trial by reason of a defect in the supervisor's certificate attached to the assessment roll for the year 1872.

On the seventeenth of March, 1877, Eliza Richards conveyed the land to Simeon by a deed, which, after reciting that she was the widow of Myron Richards, deceased, granted to the defendant Simeon Richards—

"All of her right, title, interest, and claim as widow of said deceased, and as purchaser and owner, in and to all that certain piece of land," etc.,—

Describing the 40 acres in question in this suit.

After the death of his father, and until March 1, 1877, Simeon Richards and his mother continued to reside on said land, and Simeon managed the farm as he did before his father's death; the other children, including the plaintiff, residing elsewhere, and not interfering in any manner with the occupation of the land. No administration was ever had upon the father's estate. Before his father's death Simeon was working the farm on shares, and as tenant on shares was in actual occupation of the same with his father.

After the conveyance by the mother to Simeon, she resided on the land in the family of Simeon until her death, which occurred in 1886. This was in pursuance of the terms of a mortgage bearing even date with her deed to Simeon, conditioned, among other things, for the support of the said Eliza Richards during her life, by Simeon.

On the seventeenth of March, 1877, the date of Eliza's deed to Simeon, he was actually in occupation of the land, and residing on the same with his mother. The plaintiff was living elsewhere.

On that date the circuit judge finds that Simeon assumed

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possession and control of the premises as owner, claiming the title to the whole by virtue of said deed from Eliza Richards to him.

"Said Simeon thereby ousted the plaintiff from the possession of said lands, and since that time he has been in the actual, continued, visible, notorious, and hostile possession of the same. The defendant Loretta Richards is the wife of defendant Simeon Richards, and has lived with him on the lands during the period above named as his wife."

This action was commenced August 3, 1887.

"I find as a conclusion of law that the plaintiff was not, at the time of the commencement of this suit, entitled to the possession of the premises described in the declaration in this cause."

We cannot agree with the conclusion of the circuit judge in the premises upon the facts as found by him.

It is asserted by the counsel for defendants in their brief that the court below found that the defendant Simeon Richards went into possession of the land under the tax title, and asserted his title to the whole premises as against the plaintiff under the same, and that he, therefore, was entitled to judgment under the statute of limitations applicable to possession under tax titles, having been in exclusive, continued, notorious, and hostile possession of the land for 10 years before the plaintiff brought his suit.

We find nothing in the finding of facts, as stated by the circuit judge, to warrant the conclusion that Simeon went into possession under the tax deed. The deed from his mother did not pretend to warrant any title. She only in effect quitclaimed to him all her right, title, and interest and claim as widow, "and as purchaser and owner."[1] He went into possession under a deed which conveyed his mother's interest, and no more, and there is nothing to show that he

[1] See *Eaton v. Trowbridge*, 38 Mich. 460, as to what is conveyed by a quitclaim deed, and the standing of the grantee as a *bona fide* purchaser.

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went in claiming under the tax title, except that he claimed to own the whole of the premises. This claim he might have made without any deed at all.

But whether or not he went into possession under this tax title, and so claimed to the world, he cannot use the same upon which to predicate a bar of the statute of limitations against the plaintiff's title. To permit him to do so would be to sanction fraud. This tax title was paid for by the grantor of Myron Richards, and belonged to his estate in equity. This the defendant Simeon Richards well knew, and he will not be allowed, even in a court of law, to set up a claim of ownership, which could not be in good faith, upon it, so as to set the statute of limitations in motion against its rightful owners.

At the time the tax title was acquired Eliza Richards was a tenant in common of this land with the plaintiff. She was already in possession under her right as widow, and her deed of the interest of all the heirs at law save plaintiff. She cannot be said to have taken possession of this land under the tax deed, because she was already in possession when she received it, and there is no showing that she ever held the premises one moment adversely to plaintiff, or in any other way save as a tenant in common, or under the right to occupy the homestead which the statute gave her. Being a tenant in common, the purchase of this tax-title inured to the benefit of plaintiff as well as herself. *Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Id. 292; *Dubois v. Campau*, 24 Id. 360; *Campbell v. Campbell*, 21 Id. 438; *Burhans v. Van Zandt*, 7 N. Y. 523; *Knolls v. Barnhart*, 71 Id. 474; *Weare v. Van Meter*, 42 Iowa, 128.

And this was no doubt her understanding of the matter. She could not have built up a title by the statute of limitations against the plaintiff upon this tax deed, which belonged to him as well as to her. Nor can Simeon, who stands in her shoes, be permitted to do so, having knowledge of all

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the facts of the acquisition of the title. *Dubois v. Campau*, 24 Mich. 360; *Fitzhugh v. Barnard*, 12 Id. 104; *Fallon v. Chidester*, 46 Iowa, 588; *Flinn v. McKinley*, 44 Id. 68; *Tice v. Derby*, 59 Id. 312 (13 N. W. Rep. 301).

The counsel for defendants attempt to combat this proposition by arguing that as the tax title was void it could not inure to the benefit of the plaintiff; being worthless, it could be of no benefit to him. Granted that this be so, can the defendant Simeon, upon a void tax title, which if valid would confer no title upon him as against plaintiff, yet build up an absolute title under the statute of limitations applying to possession under tax titles? We think not.

Under the proofs, the term of 15 years was necessary to bar plaintiff's action.

The judgment is reversed, and judgment entered here for an equal undivided one-sixth of the premises, with costs of both courts. The record will be remanded for further proceedings under the statute relating to actions of ejectment, if desired by the defendants.

The other Justices concurred.

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STEPHEN COLLAR v. HAMBLIN D. COLLAR.

Transfer of land for purpose of sale and distribution of proceeds—Evidence—Deed—Consideration—Pleading—Money had and received.

Under the facts in this case (see opinion) it is held:

1. That the consideration of a deed may be shown by parol.
2. That an action will lie for money had and received by a grantee on the sale of land conveyed to him under a *parol* trust to make such sale, and distribute the proceeds among the grantors.[1]

Error to Ingham. (Peck, J.) Argued April 23, 1889. Decided June 21, 1889.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Huntington & Day, for appellant.

Q. A. Smith, for defendant.

LONG, J. George Collar died in Steuben county, New York, in 1868, intestate, seized of 55 acres of land in said county, and leaving the following children, heirs surviving, being all his heirs at law, viz.: Silas, Sylvester, John, Martin, Henry, and Cameron Collar, Mary Thorne (wife of Jacob Thorne), and Stephen and Hamblin D. Collar, the parties to this suit.

The claim of the plaintiff is that in December, 1874, plaintiff and others of the heirs conveyed their interests in this 55 acres of land to Jacob Thorne, the husband of their sister Mary, for the purpose of enabling him to make a sale of the same, and distribute the proceeds among the heirs according to their equitable interests.

[1] See *White v. Cleaver*, *ante*, 17.

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In 1876, Jacob Thorne and wife, with such others of the heirs as had not conveyed to Thorne, conveyed said lands to Sylvester Collar, a brother, who resided in Kent county, this State, the purpose of which conveyance was the same as it was in the conveyance to Thorne.

In 1880, Sylvester Collar died, not having executed the trust, or conveyed said lands, and afterwards the defendant, Hamblin D. Collar, obtained a conveyance of said lands from the heirs of Sylvester Collar, deceased, which included the interest of plaintiff, which had been conveyed to Thorne, and afterwards to Sylvester, for the same purpose.

In January, 1887, defendant sold said lands, and received in payment the sum of $3,000.

The defendant refusing to pay the plaintiff his share of the proceeds of such sale, this action was brought in justice's court, where plaintiff had judgment.

Defendant appealed to the circuit court for Ingham county, and on the trial there, under instructions from the court, the jury returned a verdict for defendant, and, judgment being entered thereon, plaintiff brings the case here by writ of error.

The plaintiff claims that the defendant is liable to him as for money had and received, and on an account stated. The facts above stated do not seem to be in controversy, though defendant's counsel claims that the court improperly allowed such facts to be shown by parol.

It appears that in May, 1886, and after defendant had procured a deed of the premises from a portion of the heirs of his brother Sylvester, the plaintiff and his brother Cameron Collar went to the house of defendant in Kent county to get a settlement of their interest, and the interest of their sister, Mary, in the funds arising from the sale of these lands.

Taking the testimony of the plaintiff as true, as we must, the court having directed a verdict for defendant, it appears that an arrangement was made between plaintiff, defendant,

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and their brother Cameron, that defendant should give his note to each of these three for $225, in settlement of their interest in this fund, but that, before the notes were given, plaintiff wanted to learn from his sister, Mary, whether that amount would be satisfactory to her, but, as he claims, agreeing then and there to accept for himself the note of defendant for the $225, in settlement of his claim, and that defendant agreed to make and deliver the same to him the week thereafter, and after Mary had been consulted as to her share; that a full settlement and agreement was arrived at and made at that time; that, after consulting with his sister, Mary, he again called upon the defendant, who refused to execute the note, or to recognize any interest of the plaintiff in this fund; that he thereafter acquired the title to the whole land and sold it, receiving $3,000 therefor.

The plaintiff then offered to show by the defendant, who was called as a witness, that the defendant had settled with the other heirs and parties interested in this fund, and had paid them each the sum of $225, and upon the basis of the agreement made between plaintiff, Cameron, and defendant on May 18, 1886, as to the amount due each; that the defendant knew that plaintiff and Cameron had each conveyed their interest to their brother-in-law, Mr. Thorne, and that Thorne had conveyed these interests to Sylvester, for the purpose of making sale of the premises, and settling up and dividing the proceeds of their father's estate.

It was also purposed to be shown that the defendant obtained the whole title to this land from the heirs of Sylvester, and that he knew his brother had taken the title to the land for the purpose of thus distributing the proceeds, and that although he had recognized the rights of all the other heirs, and paid them off on the basis of the agreement made with the plaintiff of May 18, 1886, he had not paid plaintiff, and refused to recognize his rights in the fund, though he has the funds representing that interest in his hands.

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We must take this offer, under the ruling of the court below, as though these facts were settled in favor of the plaintiff.

It was under this state of facts that the trial court directed a verdict for the defendant.

The court stated to counsel:

"There can be no recovery upon any theory, either as for money had and received, or upon an account stated, or upon the special count, unless the contract is proven."

We think, under the conceded facts in the case, and the offer of proof made, which must be taken as true, the plaintiff had a right to recover, and the court was in error in directing a verdict for defendant.

It was not an interest in the land which plaintiff was seeking to recover, but his proportionate share of the fund growing out of the sale of the land which had been deeded first to Thorne, and then to the brother Sylvester, to be sold, so that the fund could be distributed. The defendant knew the conditions of these deeds, and the purpose for which they were made and delivered, at the time he took his conveyance from the heirs of Sylvester.

It is evident, from the case presented by this record, that the heirs of Sylvester, in making these conveyances to the defendant, were attempting to carry out the purpose of their father when he took the deed from Thorne,—that is, turn the lands into money, so that the fund could be distributed,—and at the time the agreement was made, May 18, 1886, the defendant looked upon the transaction as a trust created in him for that object, and he appeared willing at that time to carry out the object of the trust, and pay the money over or secure its payment by giving his notes. The whole proceeding on the trial was an inquiry into the consideration of the deed, and could be shown by parol.

If the facts are as plaintiff claims, he certainly could maintain his action, as the defendant had the money in his hands,

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received for the use and benefit of the plaintiff, which could be recovered under a count for money had and received.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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ALLAN SHELDEN ET AL. v. JACOB WEATHERWAX ET AL.

Equity—Appeal—Hearing in Supreme Court.

Where the testimony in a chancery suit is taken in open court, and no case has been settled under the statute, it must stand for hearing on appeal upon the pleadings, orders, files, and decree *alone*, and it will be presumed that there was evidence in the lower court to sustain the decree as made.

Appeal from Montcalm. (Smith, J.) Argued April 19, 1889. Decided June 21, 1889.

Bill to foreclose chattel mortgages, and for other relief. Complainants and defendants Weatherwax appeal. Decree affirmed. The facts are stated in the opinion.

John Lewis, for complainants.

George S. Steere, for defendants Weatherwax.

MORSE, J. On the twenty-eighth day of April, 1884, William H. Black, Robert Black, and Samuel Massey, of the village of McBrides, in Montcalm county, Michigan, made and executed, under their firm name of Black Bros. & Massey, to Louisa A. Black, 10 promissory notes of $100 each, securing the same by a chattel mortgage of $1,000 upon their stock of goods and merchandise in said village. This mortgage was properly filed on the same day. July 22, 1884, Louisa A. Black duly sold and assigned this mortgage to the

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complainants Allan Shelden, George A. Owen, John A. Murray, Archibald Y. Gray, Henry T. Beadle, and George S. Wells. At the time of this mortgage being filed, William H. Black had no interest in the goods mortgaged.

May 31, 1884, Robert Black and Samuel Massey, being indebted to the complainants last above named, made their note to them for $3,304.85, and, to secure such note, executed a chattel mortgage to the same complainants upon the same goods mentioned in the Louisa A. Black mortgage, and upon other property.

On the same day the Louisa A. Black mortgage was filed, to wit, April 28, 1884, Robert Black and Samuel Massey, both in their individual names and in the name of the firm of Black & Massey, which succeeded the firm of Black Bros. & Massey, made a note to the defendants Jacob and John M. Weatherwax for the sum of $5,414.80, and executed a chattel mortgage upon the same goods covered by complainants' mortgages, for the same sum, to secure the payment of the said note to Jacob and John M. Weatherwax.

The controversy in this suit grows out of these mortgages.

The complainants last above named filed their bill in the circuit court for the county of Montcalm, in chancery, to foreclose their mortgages, and asking relief against the mortgage of the defendants Weatherwax, on the ground that the same was fraudulent as against them, and a subsequent lien in any event to the Louisa A. Black mortgage, and prayed that a receiver might be appointed to take possession of the property, which was then in the hands of the defendants Weatherwax, who had taken possession of the same under their mortgage, and also asked for an injunction against the defendants Weatherwax to prevent the selling of the goods by them under their mortgage.

The defendants Weatherwax answered, denying that their mortgage was fraudulent, and insisting that their mortgage was a prior lien to the Louisa A. Black mortgage.

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A temporary injunction was issued. The bill was filed August 11, 1884. September 23, 1884, a motion made to dissolve the injunction was denied. October 2, 1884, an application to appoint a receiver was denied, upon condition that the defendants Weatherwax should execute and file a bond in the cause, with two sufficient sureties, in the penal sum of $8,000, running to the complainants, and conditioned that the defendants Weatherwax would sell and dispose of the goods and chattels embraced in the mortgages, and in their possession, at public auction, after at least 10 days' notice, to be given by posting in three or more public places in the city of Stanton, in said county of Montcalm; such sale to be made within 30 days from the date thereof. The further condition was made that the defendants Weatherwax, upon the rendering of the final decree in the cause, would pay unto the register of the court, upon demand of complainants, the proceeds of such sale, to be paid out as the court by such decree or otherwise might direct.

October 8, 1884, the required bond under this order of October 2, 1884, was filed by defendants Weatherwax, with proper and sufficient sureties.

It appears from the record that the complainants George L. Sampson, Frank D. Black, and Hammond, Standish & Co., on the third day of June, 1887, petitioned the court to be also made parties complainant in the cause, and, upon consent of the parties, this was done.

It also appears from the record that the cause came on to be heard on pleadings and proofs, April 24, 1888, at which time the circuit judge, Hon. Vernon H. Smith, made an order containing the following recital:

"It appearing to the court that no return of the doings and proceedings of the said defendants Jacob and John M. Weatherwax, under an order for the sale of the goods in question in this suit, made by this court and filed on the second day of October, 1884, has ever been made and filed in said cause; and it further appearing to the court necessary

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and proper that such return should be made, or that proof of the proceedings under such order be made upon the hearing of this cause;"—

Therefore, upon the application of George S. Steere, solicitor for defendants Jacob and John M. Weatherwax, it was decreed in such order that the cause be reopened to take testimony as to the proceedings of said defendants under said order of sale,—such evidence to be taken at Ionia, on the fourth day of May, 1888.

On the tenth of September, 1888, a final decree was entered upon the pleadings and proofs, and it was therein found and decreed by the court that the mortgage of the defendants Weatherwax should stand as the first mortgage, and have the preference over the Louisa A. Black mortgage, and that there was due on the said Weatherwax mortgage, October 22, 1884, the time of the sale of the goods, the sum of $3,556.25, and that the goods received and disposed of by said Jacob and John M. Weatherwax under said mortgage were worth, when taken, the sum of $4,000.

And the court found from the evidence as to the value of the stock, and the way and manner said stock was handled and sold by said defendants, that said defendants should account for said goods in the said sum of $4,000. It was then decreed that the defendants Weatherwax pay to the said complainants the sum of $443.75, the difference between $4,000 and $3,556.25, together with the complainants' costs, to be taxed.

From this decree both the complainants and the defendants Weatherwax appeal to this Court, but on the hearing here the complainants announce themselves satisfied with the decree, and ask its affirmance.

It seems the testimony in the cause was taken in open court. No case has been settled, and the suit must stand for hearing in this Court upon the pleadings, orders, files, and decree, without testimony. In such a case it is conceded by

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counsel for defendants Weatherwax that the presumption must be that there was evidence in the lower court to sustain the decree as made therein. But the counsel for the defendants claims that the decree should be modified to conform to the order of sale, which he claims was a final order, and that the defendants be awarded costs in both courts.

It is contended that the defendants Weatherwax can only be charged with the proceeds of the sale under said order, and it is insisted that if they did not fairly and in good faith conduct the sale in such a way as to get the fair value of the goods out of it, and that if the stock was not handled in a proper way and manner, these facts, and any others tending to show that defendants were in default in the way in which the goods were disposed of under this order of sale, should have been alleged in a supplemental bill, and an issue been formed thereon; that evidence of these facts was not admissible in the cause, and could not be properly received or considered by the court until such issue was made.

The counsel insists that as the case now stands there is no issue on the value of the property, or on the way and manner in which the defendants disposed of the property under the order of sale.

The trouble with this claim of the defendants is that there is no evidence in the record that the defendants Weatherwax ever complied with this order, except to give a bond. There is a recital in the decree, it is true, that the twenty-second of October, 1884, is the date of the sale of the goods; and, while it may be inferred from the record that the defendants Weatherwax sold them, there is nothing to show that they were sold under this order of October 2, 1884, or in compliance with its terms and directions.

No return of the sale was made to the court, and what the evidence was, or whether any was taken, under the order of the court made upon the application of defendants' solicitor, April 24, 1888, does not anywhere appear in the record before

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us. Neither are we informed by the record how much the goods were sold for,—whether for $4,000, or more or less than that sum.

It must be presumed, in the absence of any showing to the contrary, that the circuit judge was justified, from the evidence in the case, in finding that the defendants must account for the goods at the value of and in the sum of $4,000. And it does not seem to us that the counsel for the defendants Weatherwax can come into this Court in very good grace, and ask a ruling here that the testimony, if any was taken, obtained under the order made on his own application, and evidently for his benefit, should not have been considered by the court below upon the final hearing.

The decree of the court below must be affirmed, with costs to complainants.

The other Justices concurred.

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WILHELMINA KRUGER v. FRANCIS LE BLANC ET AL.

[See 62 Mich. 70.]

Homestead—Execution for costs—Husband and wife—Separate ownership of land and buildings.

1. A judgment for costs in favor of defendants, on the reversal of a judgment in favor of a plaintiff in an action sounding in tort, is subject to the statutory homestead exemption.
2. A wife can claim a homestead exemption in a farm owned by her, and upon which she lives with her husband, even though he is the head of the family, and manages the farm.
3. A wife can claim a homestead exemption in a farm on which she lives with her husband, who is the owner of the buildings and she of the land, as against *her* judgment creditors, to whom she gave notice of such claim, neither she nor her husband having made the statutory selection, and the husband making no different or adverse claim to that of the wife.

Appeal from Wayne. (Gartner, J.) Argued April 24, 1889. Decided June 21, 1889.

Bill to protect a homestead. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Henry M. Cheever, for complainant.

George H. Prentis, B. T. Prentis, and *H. G. Holmes*, for defendants.

MORSE, J. Mrs. Kruger, the complainant, on the fifth day of June, 1884, recovered a judgment against the defendants LeBlanc, Cicotte, Champagne, and Washer, in an action of trespass, in the Wayne circuit court, for $60 damages. This judgment was brought to this Court on writ of error, and here reversed, and a new trial granted, June 24, 1886

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(see 62 Mich. 70), with costs of this Court to the defendants. The costs were taxed at $90.40.

A writ of execution for this sum was issued out of this Court in due form, directed to the sheriff of Wayne county, which execution was on the twenty-fourth day of August, 1886, levied by George H. Stellwagen, then sheriff of said county, upon all the right, title, and interest of complainant in certain lands. The lands were regularly advertised to be sold under said levy, the sale to take place November 19, 1886, at 11 o'clock A. M. The sale was on that day adjourned to December 3, 1886, at 11 o'clock A. M., at which time the land was sold under said levy, and bid in by the defendant Thomas Henderson, he being the highest bidder at such sale, for the sum of $132.70.

On the same day the sheriff delivered a certificate of such sale to said Henderson, which was recorded in the register of deeds' office of Wayne county, April 22, 1887.

The complainant filed her bill, claiming that the land thus levied upon and sold—about 25 acres—was at the time of such levy and sale, and now is, her homestead, and all the land that she owns; that the premises are not worth over $1,500, and there is an incumbrance upon them of $500, which is still unpaid and subsisting; that before the sale of said land, and on the eighth day of November, 1886, she caused a notice to be served upon said sheriff, Stellwagen, under How. Stat. § 7723, claiming a homestead in the premises, and that they did not exceed the sum of $1,500 in value, and were only 25 acres in quantity.

She further alleges in her said bill that, notwithstanding the service of this notice, the sheriff, under the direction of the first four named defendants, instead of discharging such levy or taking proceedings under the statute to appraise the value of the premises, and ascertain whether it could be divided if the value was found to be over $1,500, proceeded to sell, and did sell, the lands under and by virtue of such

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levy, to the said Thomas Henderson, in violation of the law in such case made and provided.

That the term of office of said Stellwagen has expired, and the defendant Louis B. Littlefield is his successor, and, as such successor, authorized to execute a sheriff's deed under the sale made by Stellwagen; that the extreme limit of time allowed by law for redemption will expire on the third day of March, 1888, and that Henderson threatens to demand a deed of Sheriff Littlefield, and said Littlefield threatens to execute and deliver such deed to Henderson.

That Henderson, when he purchased the lands at said sale, was fully informed and knew that all the proceedings after such levy were illegal and void, for the reason that the lands were sold in violation of the statute, and without any recognition of the notice to the sheriff of claim of homestead, or any compliance with the law in reference thereto.

She alleges that this action and threatened action of the defendants constitute a cloud upon her title, and prays that Sheriff Littlefield and his deputies may be enjoined from making and delivering a sheriff's deed of the premises to Henderson, and that Henderson be restrained from receiving such deed; and that all the proceedings in the issuing and levying of said writ of execution, and the sale, and the issuing and filing of the sheriff's certificate, be declared null and void, and that the defendants Le Blanc, Cicotte, Champagne, and Washer be enjoined from issuing any other writ of execution upon the judgment for costs obtained by them in this Court for the collection thereof.

The defendant Littlefield put in a disclaimer, and the other defendants answered.

The answers, in substance, denied that the premises were the homestead of complainant, and averred the value of the same to be at least $2,500.

They admit that Stellwagen did not summon a jury, and did not adjourn said sale for 60 days, as provided in sections

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7723, 7724, 7728, 7729, How. Stat., and allege that the same was not necessary under the laws of this State, and that the sheriff in making such sale did not violate the law.

They aver ignorance as to any service of notice of claim of homestead upon the sheriff.

The answer of the defendants Le Blanc, Cicotte Champagne, and Washer also avers that on the eighteenth of November, 1886, and before the sale, the complainant filed her bill of complaint in the same court as the present bill, setting forth her ownership and occupancy of the land, and the value thereof, and the incumbrance thereon, and also the said suit, and the proceedings therein, and the taxing of said costs against her in the Supreme Court, the issuing and the levy of the execution, substantially as set forth in the present bill, and praying that the sheriff might be enjoined from selling the premises under said writ, and that the levy be canceled; that a temporary injunction was issued on the filing of such bill, which injunction, on motion, was dissolved December 2, 1886.

Afterwards, on December 15, 1886, said cause being at issue, the complainant, by notice duly given, obtained the right to take testimony in open court, as in a suit at law; since which time nothing has been done, and the case seems to have been practically abandoned by the complainant.

Replications to the answers were filed, and proofs taken, and on the hearing Judge Gartner granted a decree in favor of the complainant; declaring that the property was the homestead of the complainant at the time of the levy, and not exceeding $1,500 in value, and occupied by her as such, and not liable to be sold on execution without taking the steps required by the statute; that notice was given as claimed by complainant to Sheriff Stellwagen, and that he sold the premises in disregard of such notice.

The decree perpetually enjoins the sheriff and his deputies from executing and delivering any deed upon the sale, and

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declares all the proceedings in the premises, after the levy of the execution, null and void, and provides that a record of the decree in the office of the register of deeds of Wayne county shall operate to remove the cloud from complainant's title caused by the issue and filing of the certificate.

The record shows clearly enough that the proper notice of a claim of homestead was served upon the sheriff. It is equally clear that he paid no attention to it. The complainant owned and occupied the land. The value of it is not certain from the testimony, and as the case stands is immaterial.

The argument is made that the demand against Mrs. Kruger, being a judgment for costs in an action brought by her sounding in tort, is such that there is under the Constitution or the statutes no homestead exemption. It is claimed that neither the Constitution nor the statute exempts any homestead against judgments in tort actions.

It is sufficient for the purposes of this suit that the judgment upon which the execution and levy was based was not rendered against Mrs. Kruger for any tort that she had committed. It was a judgment for costs expended by some of the defendants in securing a reversal of a judgment against them. Such a judgment must be subject to the homestead exemption allowed by law.

It is also contended that Mrs. Kruger could not plead a homestead in the premises, because the record shows that her husband owned the buildings upon the place, and was the real occupant of the land, and the head of the family.

The testimony shows that Mrs. Kruger and her husband moved upon the land in 1870, and that he then owned it. In 1880 he deeded it to his wife. The husband, who was a witness, testified that he owned the buildings, as he deeded her only the real estate. It appears, however, from the testimony of the complainant, that the present house in which they live, the barn, and a stable have been built on the place since

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the deed of the land to her. It also appears from the testimony of both of them that for the last 12 years the husband has been lame with the rheumatism, and unable to do but little work on the farm. Mrs Kruger and the children have done the work on the farm, and she has practically managed it. We think the circuit judge was right in determining the premises to be her homestead. The land is hers, and she lives upon and works it, and claims it as her homestead.

It would seem from the testimony, also, that the buildings are hers. It is true, the husband claims to own them, but they were put on the place after she owned the land. He puts his ownership on the ground that he only deeded her the real estate; but to be the owner of them, under the circumstance of their having been built since his deed of the land to her, there must have been some agreement between them by which he obtained the right to build them on her land. The probabilities are that she would be determined to be the legal owner of the buildings by reason of her ownership of the land, if any contest should arise between the husband and herself.

But suppose the buildings do belong to the husband, how does the case then stand? It is contended by the counsel for the defendants that there cannot be a double homestead in these premises; that, if the husband owns the house and the buildings, he would be entitled to them as his homestead. Then, if the wife be also given the homestead exemption of the land, there is a double exemption, not authorized or contemplated by the Constitution or statutes, under the most liberal interpretation of the same.

The learned counsel admit that if she owned the buildings she would be a householder, and an occupant, under the statutes (How. Stat. §§ 7721, 7723, 7728), and that in such case the law would not prevent her claiming her homestead exemption because her husband jointly occupied the house with her. But they insist that if the husband owns the house,

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and is living in it, he, and not the complainant, is the "householder" and the "occupant" referred to, and protected in the rights of the homestead, in these statutes; and that all the homestead right she can have in the premises comes incidentally under him, the homestead being for the benefit of the family, and not from any constitutional or statutory right of her own, not connected with his occupancy and possession; that a married woman, living with her husband in his house, cannot be in law a householder.

We do not think it material in this case who owns the buildings, or who is the actual head of the family. There is no testimony in the case as to the value of the buildings on the land. If Mrs. Kruger owns the buildings as well as the land, and this is all the real estate owned by either herself or husband, and they are living upon it, she has the right to claim it as her homestead, and it is exempt to the value of $1,500; and this is her right, even if her husband is the head of the family, and manages the farm. If her husband owns the buildings, she has still this right, as against the defendants. There has never been any statutory selection of a homestead by either herself or her husband. The homestead is for the benefit of the family. The wife is as much interested in it as the husband. These defendants levy upon her lands,—land upon which she, her husband, and family are living. She gives the proper notice to the sheriff that she claims it as a homestead. Her husband does not interfere or make any claim of a homestead adversely to or different from her claim. It is of no concern to these defendants what he might do if his property was levied upon by some one else for his debt.

True, this family can have but one homestead, but, if the buildings and the land together are not worth over $1,500, this family would be entitled to the whole as a homestead, even if the husband owned the buildings and the wife the land; and, if the land alone is worth $1,500 or more, then, if

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the wife claims and secures such land to the value of $1,500 as a homestead, without any protest or denial by the husband, the homestead of the family—of both husband and wife—will be fixed in the land.

The judgment and decree of the court below is affirmed, with costs.

The other Justices concurred.

ADOLPH DUVERNOIS v. THE ESTATE OF DOROTHEA KAISER, DECEASED.

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Executors and administrators—Final account—Appeal.

While in cases of appeal by executors from the settlement of their final accounts the appellate court is to deal with such accounts in a spirit of equity, it must nevertheless have full material to act on, and must know precisely what was allowed or disallowed below, and cannot act on a new or different basis of fact.

Error to Wayne. (Hosmer, J.) Argued June 5, 1889. Decided June 21, 1889.

Appeal by executor from settlement of final account. Judgment of circuit court, affirming that of the probate court, affirmed. The facts are stated in the opinion.

Corliss, Andrus & Leete, for appellant.

Andrew J. Linzee, for estate.

CAMPBELL, J. Appellant served as executor from sometime in 1878 to 1885. In 1886 he was called on to account, and in June, 1887, the probate court of Wayne county found a balance due from him of $991.86. From this he appealed, setting up no ground of appeal except that he should have been allowed credit for this sum.

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In the circuit court the probate decision was affirmed, and the case comes up on exceptions and error on the single assignment, in two or three shapes, that the judgment of the circuit court was not authorized.

We have examined the record with some care, and are unable to gather from it precisely what was allowed and what disallowed. There are no definite grounds or items of appeal set out in the claim of appeal from the probate court, and there is in neither court any itemized statement of how the precise balance was made out. The testimony in the case is not such as to clear up the difficulty, or to enable us to settle the equities. The balance may have been made by adding charges or denying credits, and we get no sufficient light from the testimony or the exceptions. On the argument reference was made to compound interest, but the record does not show just what it was or what ruling was made on it. There was also testimony concerning services and counsel fees and other expenses, but how far the probate or circuit court went in dealing with these things the printed record and exceptions do not help us to know, or even to very closely conjecture. It seems probable that in the circuit court the parties and court understood each other, and knew what was admitted and what disputed. But unless this appears in the record we cannot consider it. In this Court we cannot act on matters not appearing in the papers.

While in these cases we are by our practice authorized to deal with such accounts in a spirit of equity, we must nevertheless have full material to act on, and we must know precisely what was allowed or disallowed below. We cannot act on a new or different basis of fact. So far as we can make out from the bill of exceptions, there was nothing determined definitely concerning what would be properly compound interest which under our decisions would be improper, and no definite finding how much allowance was made for services and outlays. We have not been impressed, so far as we can

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get at the case, with the idea that any injustice has been done; and, in view of the concurrence of both courts below, we should at least have shown to us very plainly wherein any wrong has been brought about.

The decree must be affirmed, with costs, and certified back.

The other Justices concurred.

MONROE EVANS v. GEORGE E. COLLAR ET AL.

Sheriff—Indemnity bond—Levy on exempt property.

1. A sheriff cannot demand indemnity for levying on exempt property, and is bound to know what his duty is in regard to any claim of exemption by the judgment debtor.[1]
2. A bond reciting a levy on property claimed by other persons than the execution defendant, and conditioned to indemnify the officer for taking and selling goods and chattels which he or his assistants "shall judge to belong to the said adverse parties," is not ambiguous, and cannot be applied to anything beyond its terms.

Error to St. Joseph. (Pealer, J.) Argued June 12, 1889. Decided June 21, 1889.

Assumpsit on indemnity bond. Defendants bring error. Reversed. The facts are stated in the opinion.

C. W. W. Clarke and *T. C. Carpenter*, for appellants.

B. E. & L. F. Andrews, for plaintiff.

CAMPBELL, J. This suit was brought on an indemnity

[1] How. Stat. § 7711, provides that in case of *reasonable* doubt as to the *ownership* by a judgment debtor of any goods or chattels, or as to their *liability* to be taken upon an execution, the officer may require indemnity, etc. This section applies to writs of attachment, and, in case of a seizure under a promise to furnish the bond, the officer may release his levy on its non delivery. *Smith v. Cicotte*, 11 Mich. 383.

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bond given to plaintiff to indemnify him for the service of a writ of execution on a judgment in favor of George E. Collar against Julia Hirschfield. Plaintiff levied on personal property which belonged to her, but which was exempt, and she sued him, and recovered damages for its conversion.

The bond recited the judgment, and that plaintiff had levied on property claimed by other persons than the defendant in the writ. The condition was to save harmless and indemnify plaintiff for taking and selling goods and chattels which he or his assistants "shall judge to belong to the said adverse parties."

The property here belonged to the defendant in execution, and not to third parties. The sheriff could not demand indemnity for such property, and was bound to know what his duty was in regard to any claim of exemption. He did not procure indemnity against any such claim on behalf of Mrs. Hirschfield. The bond is in no way ambiguous, and cannot be applied to anything beyond its terms.

The judgment below, holding to the contrary, was erroneous, and must be reversed, with costs, and a new trial granted, inasmuch as the bond is not so set out in the declaration as to show the variance.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. MORSE, J., did not sit.

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August Manke v. Susan Manke.

Deed by husband to wife—Fraud—Competency of grantor—Agreement in consideration of marriage.

1. A *verbal* promise to convey land in consideration of marriage is a sufficient *moral* obligation to make its fulfillment legal, except as against creditors.
2. A man who is sane and intelligent cannot be held incapable of providing for his wife, whether wisely or unwisely.

Appeal from Wayne. (Gartner, J.) Argued June 12, 1889. Decided June 21, 1889.

Bill filed by husband to set aside deed to his wife as obtained by undue influence. Complainant appeals from decree dismissing the bill. Decree affirmed. The facts are stated in the opinion.

George A. Chase, for complainant.

Grosvenor, Bragdon & Grosvenor, for defendant.

Campbell, J. This case involves no legal questions, but is one of fact.

Complainant, who had been twice married before, was in October, 1884, married to defendant, he being over 60 years old, and she a widow some 15 years younger. He had a large family, mostly, but not all, grown up, and she had also some children. She then lived on a farm of her former husband, in or near Rogers City. He had land in that region, and had also a farm of 80 acres in Sumpter, Wayne county. They went upon this latter farm to live, and still live on it. Not very long after their marriage he, with her assent, conveyed his northern land to his children. In February, 1886, complainant conveyed his home farm to defendant. This

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conveyance he seeks to have set aside, as obtained by undue influence.

The court below found that there was no evidence of fraud, undue influence, or other improper dealings in obtaining it. The testimony strongly indicates that he verbally promised defendant that, if she would marry him, she should have the farm. If so, although that promise should have been in writing under the statute of frauds, it still was a sufficient moral obligation to make its fulfillment legal, except as against creditors, and no such difficulty exists here. But, whether there was any such agreement or not, there was nothing illegal in her desiring and seeking for a conveyance, provided complainant was not defrauded or put under pressure which he could not easily resist. A man who is sane and intelligent cannot be held incapable of providing for his wife, whether wisely or unwisely. We find nothing to indicate that he was not able to manage his own affairs, and do what he would with his own; neither do we find in defendant's subsequent conduct anything to indicate that she had acted in any fraudulent or sinister way. The parties never quarreled or separated, and do not seem to have found the transaction a reasonable cause of discord. The bill was not filed until over a year and a half after the conveyance, and up to that time, at least, they got along well enough. We do not think there is anything which would justify us in disturbing the decree below, that would not assume that a husband cannot, under any circumstances, give his property to his wife without raising a presumption of fraud. There is no such rule of law.

The decree must be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. MORSE, J., did not sit.

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MARSHALL FIELD ET AL v. EPHRAIM H. PLUMMER.

Judgment—Service of process—Error in name of defendant.

A man sued by actual service of process, under a name which he is called by and known, may be held upon a judgment under that name.

Error to Wayne. (Reilly, J.) Argued June 14, 1889. Decided June 21, 1889.

Debt on judgment. Defendant brings error. Affirmed. The facts are stated in the opinion.

Julian G. Dickinson, for appellant.

Elliott G. Stevenson, for plaintiffs.

CAMPBELL, J. Defendant was sued on a judgment rendered against him in Illinois as Edward H. Plummer. His defenses noticed were the statute of limitations, and the non-service of process on him. He also on the trial claimed that he was a surety, and that many years ago plaintiffs agreed not to enforce the judgment.

On the trial in the circuit there was proof that defendant had been known for various purposes by the name of Edward, and proof that the writ was actually served on him, as well as some proof of his knowledge and recognition of the judgment.

There was no plea or notice of the defense set up as arising out of suretyship, and it could not come in unless pleaded. We need not, therefore, consider that matter.

There can be no question that a man sued by actual service of process, under a name which he is called by and known, may be held upon a judgment under that name, and this judgment was so identified. There was a direct conflict

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of testimony whether service was made on him or not, and we cannot disturb the finding of the jury, who were correctly instructed on that point. The defense under the statute of limitations was not made out.

While there are circumstances which might render the long neglect to inforce the judgment suspicious, and perhaps unjust, we can only deal with it on legal grounds, and find no error in the record.

The judgment must be affirmed, with costs.

CHAMPLIN and LONG, JJ., concurred. SHERWOOD, C. J., and MORSE, J., did not sit.

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LUDWIG LAY v. THE CITY OF ADRIAN.

Municipal corporations—Injury from defective bridge—Evidence—Expert testimony—Presentation of claim to city council—Construction of statute providing for.

1. In a suit for injuries received by reason of the defective condition of a bridge, evidence tending to show the existence of loose plank and rotten stringers a month prior to the accident is admissible.
2. It is not proper cross-examination of a physician, who has testified to the nature of injuries sustained by a plaintiff and the prospect of a full recovery, to ask him if he would be able to say from an examination of the plaintiff, if he had never seen him, that he was unable to do manual labor, said question being hardly proper for a medical expert.
3. A statute providing that all claims against a city shall be audited and allowed by the common council, and that the failure to present such claims, properly itemized and verified, shall be a sufficient defense in a suit for their recovery, does not apply to a claim for damages for a personal injury sustained by reason of the negligence of the city, but to claims arising out of contract, or for injury to property, where the amount claimed may be computed, after the facts are established, by some fixed rules or mode of computation.

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Error to Lenawee. (Lane, J.) Argued January 16, 1889. Decided June 28, 1889.

Case for injuries received by reason of defects in bridge. Defendant brings error. Affirmed. The facts are stated in the opinion.

J. W. Helme, Jr., city attorney, for appellant.

Watts & Smith, for plaintiff.

SHERWOOD, C. J. The plaintiff brings this suit against the city for personal injuries received while passing over a bridge therein, which it is alleged the city negligently allowed to be out of repair, and in consequence of which he sustained great damage.

The cause was tried before a jury, and the plaintiff recovered $2,800. The defendant brings error, and assigns 18 errors in the proceedings by which the judgment was obtained.

From the record it appears the bridge upon which the injury was received was a small wooden structure, and at the time the accident occurred the plaintiff was driving over the same upon a walk; that some of the planks used for a covering had become loosened, and that while crossing plaintiff's horse stepped upon one of them, which did not reach across the bridge, and, the end of the plank not reaching the stringer, it was thrown up with great violence when stepped upon by the horse, striking the plaintiff in the back of the head, and knocked him off his wagon, his face striking upon the bridge as he fell, seriously injuring him; and the testimony tends to show that for some time he was unconscious, and that he has been unable to labor since, and that it is doubtful whether he will ever recover from his injuries.

But little question was made upon the trial at the circuit as to the injury received by the plaintiff, or how it occurred, but the defendant contended that if the bridge was out of

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repair, as claimed by plaintiff, prior to the accident, the defendant had no knowledge or notice of such fact in time to repair it.

The defendant also claimed that the injuries received by plaintiff were of a temporary character, and not permanent, and that if he had any claim therefor, it should have been presented to the city council for payment before bringing suit therefor.

The injury occurred on the fifth day of July, 1887, and it was claimed on the part of the plaintiff that the city was notified of the defective and unsafe condition of the bridge the latter part of June, and that the plank on the same were loose and dangerous.

It appears the stringers were but two or two and one-half inches thick, upon which the ends of the short plank rested, and at those places the stringers were decayed and crumbling.

It appears from the testimony of Mr. Kent, the city's deputy-surveyor, that on the thirteenth day of June previous to the accident he made an examination of the bridge, and saw its condition, and he further testified that he saw no loose planks upon the bridge, and that he saw no indications of decay of the stringers, but was not near enough to them to detect it if it had existed; that he made such examination at the request of the chairman of the street committee of the city.

At the close of the trial, and at the request of the defendant's counsel, the court submitted to the jury the following special question:

"Was Railroad street bridge in a condition reasonably safe for public travel on June 13, 1887, the date of Mr. Kent's examination?"

The jury answered the question in the negative.

W. D. James, one of plaintiff's witnesses, also testified that he informed Mr. Lawrence (who was one of the aldermen of the city, and chairman of the committee on streets

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and bridges), the latter part of June, that the planks on the bridge in question were loose, and tipped up when teams were crossing, and that it was unsafe, and that Mr. Lawrence replied that he would attend to it. Mr. Burger was called for plaintiff, and testified that he was on the bridge the day of the accident, and before the plaintiff left the bridge, and walked over the bridge and examined it some. He was asked by counsel for the plaintiff,—

"What was the condition of the stringers of the bridge?"

The witness answered:

"We crossed the bridge there, and we noticed there was, I think, a number of planks that were loose on the bridge, and some of the stringers appeared to be rotten."

We see no error in the admission of this testimony. The condition of the bridge was in issue, and it was a part of the contention of plaintiff that not only were there three or four short planks loose, but that the stringers were rotten. It was also rebutting the testimony of the defendant showing that the stringers were not decayed.

Dr. Stevenson was called as a witness for the plaintiff, and after testifying as to the nature and character of the injury, and as to the prospect of full recovery therefrom, was cross-examined by Mr. Helme, the city attorney, and, among others, he was asked the following question:

"Would you be willing to state upon an examination of Mr. Lay, not having seen him before, that he was unable to do labor?"

The doctor answered:

"Yes, sir; but I have examined him also."

He was then asked:

"Would you be able to say, from an examination of Mr. Lay, had you never seen him, that he was unable to do manual labor?"

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The court held this question improper as it was put, but at the same time said to counsel:

"I think that counsel is entitled to know from the doctor whether his opinion is based on what he saw himself entirely, or what he saw and also what this man said to him."

I see no objection to this ruling. The question was not proper cross-examination, and can hardly be called a proper question for a medical expert.

We discover no other testimony offered and received needing further consideration.

The charter of the city of Adrian (Act No. 384, § 112, Local Acts of 1887) contains the following clause:

"The council shall audit and allow all accounts chargeable against the city, but no account or claims or contract shall be received for audit or allowance unless it shall be accompanied with an affidavit of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; that the sums charged [therefor] are reasonable and just; and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each.

"It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city, that it has never been presented, verified as aforesaid, to the council for allowance; or that the claim was presented without the affidavit aforesaid, and rejected for that reason; or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it."

It was urged in the court below that this section of the statute is a sufficient defense to this action, as the claim made by the plaintiff was never presented to the council of the city for allowance, and our attention is called to *City of Detroit v. Paving Co.*, 38 Mich. 358; *Louden v. City of East Saginaw*, 41 Id. 18 (2 N. W. Rep. 182); and to *Mead v. City of Lansing*, 56 Id. 601 (23 N. W. Rep. 444),—as sustaining

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the defendant's position. The circuit judge ruled otherwise, though expressing some doubts as to the correctness of his ruling. At the close of the plaintiff's testimony it was admitted by his counsel that the plaintiff never presented his claim made in this suit for allowance to the council of the city of Adrian, and thereupon counsel for the city moved to strike out the plaintiff's testimony in the case. This the court refused to do.

Defendant's counsel also presented at the close of the trial the following request to the court to charge:

"It is conceded that this claim has never been presented to the city council for allowance. I therefore charge you that as the claim has never been presented to the city council of Adrian for allowance, as required by section 112 of the Adrian city charter, the plaintiff cannot recover in this cause, and your verdict must be for the defendant."

The request was denied. The exceptions taken to the last two rulings of the court present the real question in the case. I think the rulings were not erroneous. The claim of defendant's counsel is not sustained by the authorities referred to. None of them were claims made for personal injury. They were actions in assumpsit. The first was brought to recover for a quantity of sand it was alleged the city of Detroit had received and not paid for, and the last two to recover for alleged illegal taxes paid under protest.

I do not think the statute was ever intended to apply to claims of the character of that in the present suit, but to those arising out of contract, express or implied, or for injury to property real or personal, where the amount claimed may be computed, after the facts are established, by some fixed rules or mode of computation. The claim here made is susceptible of no such proof of the amount of the recovery, but very largely rests in the good judgment and sound discretion of the court or jury, and, if tried by the latter, under proper instructions from the court as to the law which should govern in the case.

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The claim sued for is not one proper for audit and allowance by a municipal board. It is for personal injury, one in which the items thereof cannot be itemized by the injured party in such manner as to enable an auditing board to pass upon it intelligently without the aid of a court, and does not come within the description of those included within the statute; and, while I have no doubt the board of the city or the common council might make an adjustment and settlement of such a claim if the claimant saw fit to make such settlement, still I do not think it was intended to compel him to present such a claim to the council before he should be permitted to have a court, or a jury under the instruction of the court, pass upon it.

The mental suffering and physical pain frequently arising from personal injury cannot be made items in an account, and be passed upon by an auditing board, and hence it is that the statute cannot be made to apply to such a case. Such a claim at common law never existed except with the injured party, and now only survives him by virtue of express statute to that effect. The language used in connection with the class of claims which must be brought before the common council for allowance before suit is brought therefor I think clearly shows that one for personal injuries was never intended.

It will be noticed that it requires all the items of such claim to be stated, giving the dates of each, and the further statements that the claimant believes it to be correct; that no part of the same has been paid, unless indorsed upon the account presented; that the sums charged are reasonable and just for the services and property therein mentioned; and that no set-off exists against the claim; and these facts must be sworn to by the claimant.

This is not language usually used by courts or legislators in speaking of a claim made by an individual against a city or village, or any other party, for an injury to his feelings, or

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for mental anguish and physical pain he has suffered through alleged negligence of a defendant.

The statute is in derogation of common law, and should be strictly construed; and, when we consider the nature and character of this claim, I think there is no room left for doubt that it was never contemplated the statute should receive the construction given it in this case by defendant's counsel.

I find no other errors assigned in the case needing special attention, and the judgment should be affirmed.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

EUGENE FELLOWS v. MARY A. CANNEY.

Removal of cause because of interest of circuit judge—Petition to circuit court commissioner—Jurisdiction.

1. A petition for the removal of a cause under How. Stat. § 6495, which states that the presiding judge was counsel for the petitioner, and assisted her in selecting a jury on a former trial, and that, on the case being called for a second trial before him, he announced that he could not try it, as he had been so interested before assuming his duties as judge, is sufficient to give jurisdiction.
2. On *certiorari* from a circuit court commissioner to review proceedings for transferring a suit to another circuit on account of the interest, etc., of the presiding judge, in the absence of conflict of testimony, the Court will determine, as a question of law, whether the commissioner was correct in his conclusion; but, if such conflict exists, the finding of the commissioner must control. *Curtis v. Wilcox*, 73 Mich.——(41 N. W. Rep. 863).

Certiorari to the circuit court commissioner of Muskegon county to review proceedings for transfer of suit. Argued

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February 15, 1889. Proceedings sustained June 28, 1889. The facts are stated in the opinion.

J. C. FitzGerald, Nelson DeLong, and *Stephen H. Clink*, for petitioner.

George A. Farr, for respondent.

SHERWOOD, C. J. In 1886, the defendant in error commenced a suit, in the circuit court for the county of Muskegon, against the plaintiff. An issue was joined therein, and the cause was tried before Judge Russell, with a jury, at the October term, 1887, and the defendant prevailed. At the time of the trial, Mrs. Canney resided in Muskegon, and Mr. Farr, of Ottawa county, was her attorney in the suit. Mr. Fellows resided in Nebraska, and Mr. DeLong, of Muskegon, was his attorney.

On the seventeenth of November, Mrs. Canney, by her attorney, moved the court to set aside the verdict and judgment, and grant a new trial. This motion was heard by Judge Russell, who, on the twenty-ninth of December, granted the same, and ordered a new trial. His term of office expired on December 31, 1887, and on the first day of January he was succeeded by Judge Dickerman upon the bench.

On the fourteenth of February following Mrs. Canney, believing Judge Dickerman to be disqualified, by reason of his having been her attorney and having previously done some business for her in her case, to sit in the same upon the second trial, filed her petition before Circuit Court Commissioner Bassett, of Muskegon, praying for the removal of the case for trial to Ottawa county.

On the twentieth of February, 1888, a hearing was had on the motion before said commissioner, which resulted in his making an order for the removal of said cause to Ottawa circuit for trial.

The defendant below now asks a review of the proceedings

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had before the commissioner upon *certiorari*, and contends that the order of the commissioner should be vacated for the following reasons:

"1. Because the said commissioner sustained the objection of the said plaintiff's attorney to the question asked by this deponent of the witness John Tait.

"2. Because the said commissioner held and decided that it was immaterial, upon the hearing of said petition, who the attorney of record for said defendant in said cause was, or in what county he resided, if he became such attorney subsequent to the filing of said petition.

"3. Because neither the evidence upon the hearing of said petition, nor the finding of facts by said commissioner, authorized said commissioner to make the said order to remove the said cause for trial from the circuit court for the county of Muskegon to the circuit court for the county of Ottawa.

"4. Because the said petition was insufficient and void in law, and the proceedings had before said commissioner did not confer jurisdiction upon said commissioner to make said order of removal."

We think the petition was sufficient to give the circuit court commissioner jurisdiction. She says in her petition that Judge Dickerman was counsel for her in her said cause, and assisted her attorney in selecting the jury for the trial thereof at the October term, 1887, and has otherwise counseled her therein; and that after his accession to the bench, and when her cause was called for trial, he announced he could not try the cause, as he had been interested as her counsel therein before assuming his duties as judge. We think that this statement, with the other facts stated by her, was sufficient. How. Stat. § 6495.

John Tait was examined as a witness, upon the hearing before the commissioner, for the defendant. He was clerk of the circuit court, and the commissioner refused to allow him to state who was at that time attorney of record for defendant. This ruling was proper, as who was the attorney of the defendant at the time the petition was filed was the

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only question material upon this point. The fact that another attorney had been employed and substituted after the petition was filed could not properly be considered before the commissioner.

The only remaining question is: Was the evidence upon the question of Judge Dickerman's acting as Mrs. Canney's attorney or counsel in the case sufficiently made to appear either by the testimony or upon the finding of the circuit court commissioner? If there had been no conflict of testimony upon the subject, it would be, upon this record, a question for this Court to determine and ascertain whether the circuit court commissioner was correct in the conclusion he reached. It would become one of law, merely. *Curtis v. Wilcox,* 73 Mich. ——(41 N. W. Rep. 863). But there was a conflict of testimony upon the question in this case, and the finding of the commissioner must control; and which, I think, was clearly supported by the preponderance of the proofs.

Mrs. Canney testified before the commissioner that—

"After this cause was commenced, and before the first of January, Mr. Dickerman counseled me in this matter. This case was tried in the fall in this circuit. Judge Dickerman assisted in striking a jury in the case."

On her cross-examination she further testified:

"I did go to Judge Dickerman's office, and talk with him about this case. Never stated the detailed facts; not in every point. I could not tell you what I said. He advised me with reference to what I did. He drew papers for me in the matter of a new trial."

She further said:

"He told me that I had a good case, and Eugene [the defendant] ought to pay."

Judge Dickerman denies this last statement, in giving his testimony, but says:

"I have been attorney or counsel of Mary Canney in that

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case, not of record. She has paid me fees for drawing affidavits for a motion for a new trial. * * * I never counseled with her as to the subject-matter of that case."

He also declined to preside at the trial of the case because of his connection with the same. Indeed, this question was put to him by Mrs. Canney's counsel:

"Would not you refuse to sit as trial judge by reason of your employment on this case?" And he answered, "Yes, sir."

I think the showing must be held sufficient for the removal of the case, and the action of the circuit court commissioner must be sustained.

The other Justices concurred.

EZEKIEL DECAMP ET AL. v. FRANK A. SCOFIELD.

Assumpsit—Promissory note—Consideration—Executory promise—Evidence.

1. A promise by a *third* party to pay the balance due on certain promissory notes must be based upon a sufficient consideration, which need not be expressed in the writing, but may be proved by any other legal evidence.
2. The admission of a valuable consideration in an agreement does not deprive the promisor of the right to prove what the consideration actually was.
3. Where the consideration for an agreement sued upon is the executory promise of the plaintiffs, they cannot recover without showing performance on their part.
4. In a suit on an agreement to pay the balance due on certain promissory notes, not exceeding a fixed sum, evidence of the failure of the plaintiffs to endeavor to collect the amount due by suit against the payor, before calling upon the defendant for payment, which oral agreement defendant testified was a part of the consideration for his agreement, is admissible, and does not tend to vary defendant's agreement.

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Error to Clinton. (Smith, J.) Argued April 18, 1889. Decided June 28, 1889.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Fedewa & Lyon, for appellant.

O. L. Spaulding, for plaintiffs.

CHAMPLIN, J. In the fall of 1883 Potter, Beattie & Co. made four promissory notes, one payable 15, and the others 60, days after date, to the order of J. A. Cooper, aggregating $3,700 in amount.

On the twentieth of October, 1884, defendant executed and delivered to the plaintiffs, under the firm name of De Camp, Upton & Co., the following paper writing, viz.:

"For a valuable consideration, I, this twentieth day of October, 1884, agree to pay De Camp, Upton & Co. all the balance due and unpaid on all notes given by Potter, Beattie & Co. to De Camp, Upton & Co., indorsed by James A. Cooper; and said amount that I agree to pay is not to exceed $1,500 in all.

"*October 20, 1884.* FRANK A. SCOFIELD."

This action was brought in assumpsit, counting upon the above agreement, and also the common counts, based upon and confined to the above instrument, which is called a note by plaintiffs' attorney.

Defendant pleaded the general issue, and annexed thereto a notice as follows:

"*Sir:* Please to take notice that the defendant will, on the trial of this cause, insist upon, and give in evidence under the general issue above pleaded, that the note and agreement in writing upon which this action is brought was signed by this defendant and delivered to the said plaintiffs upon the express consideration, agreement, and promise of the said plaintiffs that the said Ezekiel De Camp would and should aid and assist this defendant in purchasing and obtaining the control, management, and ownership of the

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property and business in the village of Ovid, in said county, known as the 'Ovid Carriage Works,' formerly owned by one James A. Cooper and this defendant (being the property now owned by the Scofield Buggy Co.), and that they, the said plaintiffs, should and would attempt and endeavor to collect the amount of the notes, so guaranteed by this defendant as in plaintiffs' d claration alleged, from the indorser thereof, the said James A. Cooper, and that they would take the proper legal steps to collect the said notes of said Cooper; that there was no other or different consideration for defendant's promises in said agreement contained upon which this suit is brought; that the said Ezekiel De Camp did not aid and assist this defendant in the purchase of said carriage works, nor in getting the control or management of the same, nor any one else for said plaintiffs; and that the said plaintiffs have not attempted or endeavored to collect the amounts of the said notes indorsed by said James A. Cooper, from him, the said James A. Cooper, and that the said plaintiffs have taken no legal steps whatever to collect said notes from said James A. Cooper."

Upon the trial the plaintiffs proved the Potter, Beattie & Co. notes and indorsement of James A. Cooper, and also read in evidence the above agreement signed by Scofield, and then rested their case. The defendant was introduced as a witness in his own behalf, in reference to the consideration of the agreement, and testified as follows:

"The consideration for the giving of the agreement was that Mr. De Camp was to aid me in getting possession of the factory, the Scofield and Cooper plant; also that he was to take legal proceedings against Mr. Cooper before he asked me for a dollar; and it was also stated that he expected to get out of an order of N. J. Clark to Potter, Beattie & Co. enough to reduce the amount down to about $1,000. He agreed to take legal steps against Cooper to collect the papers against Potter, Beattie & Co. that Mr. Cooper was on,—the papers referred to when I gave the agreement in question.

"I was making arrangements for the purchase of the business from about the first of August, 1884, up to about January 1, 1885, when I got possession. I don't know of anything that De Camp did towards aiding me in getting the business. He has never asked me to pay the amount mentioned in the agreement, but asked me to secure it about the first of last

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May. I asked him what he had done towards getting it of Mr. Cooper, and he said that, even if I did secure it, why if he got it out of Cooper he would release it, or, if I paid it, why he would reimburse me if he got it out of Cooper.

"At the time, and before I signed the agreement, he agreed to take steps to get it,—to take legal steps against Cooper before he asked me for it.

CROSS-EXAMINATION.

"He so agreed with me the first time to take legal proceedings to collect of Cooper about ten days before I signed the paper. On the day that I signed the paper I asked him, also, to have it put in in regard to legal proceedings, and he said his word was good enough. He never asked me to pay the note or agreement, but about the first of last May asked me to secure it. He was to aid me in getting the creditors to assign at a per cent. I offered, and give his influence to me instead of Cooper, who was trying to get the business. He said if he assisted me I must help take care of this indebtedness."

Ezekiel De Camp, one of the plaintiffs, was then placed upon the stand, and testified in his own behalf as follows:

"The arrangement was with Mr. Scofield that I should assist him what I could about getting back in business,—the carriage shop business,—and he was to give me this note for it. In consideration of the giving of this note I was to assist in helping to raise money, so that he could pay off his creditors, and there was not any arrangement about my suing Cooper. I didn't tell Anderson that I was to sue Cooper before I could collect from Scofield. Scofield told me that he thought Anderson knew enough about Cooper's matters, so that not only the $1,500 but the whole of the notes could be collected. He wanted me to see Anderson, and to sue Cooper. I said I would sue Cooper if he would put in the money for it. I had paid good money for poor long enough. Anderson would give no information about Cooper's matters. I asked Scofield to pay this note in a conversation at the bank in April or May before this suit was brought. He said he would pay or secure in a few days."

The plaintiffs also offered testimony tending to prove that Mr. De Camp did render service to defendant in getting back the business.

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After the testimony was closed the plaintiffs' attorney moved to strike out the testimony which had reference to the agreement to sue Cooper before collecting from Scofield, as tending to vary the written contract. The court held that the oral agreement, that plaintiffs agreed that they would collect from Cooper before pursuing defendant, would vary the terms of the written agreement, and ordered all the testimony tending to prove such agreement stricken out. This ruling raises the only question in the case.

Every agreement which is valid and binding must be based upon a sufficient consideration. The defendant was not a party to the Potter, Beattie & Co. notes. His undertaking was that of an original promisor to pay the balance due and unpaid on the notes, not exceeding $1,500. It therefore required a consideration. It was not necessary that it should be expressed in the writing, but it could be proved by any other legal evidence.

The defendant admitted a valuable consideration for the promise in the writing, but this did not deprive him of the right to prove what the consideration actually was. He set up in his notice that such consideration was the executory promise of the plaintiffs, and he had the right to prove it upon the trial, and, if there was a total or partial failure to perform on the part of the plaintiffs, he could show it as affecting the plaintiffs' right of recovery.

Where the consideration for defendant's promise is the executory promise of the plaintiffs, they cannot recover without showing performance on their part.

That portion of the plaintiffs' promise which related to first taking steps to collect of Cooper no more varied the written agreement than the other portion of the promise which is admitted by DeCamp, that he should assist Scofield what he could in getting back in business. Neither varied the terms of the written agreement, but is consistent with it.

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What is meant by the expression that he will pay "all the balance due and unpaid on all the notes," if it does not refer to the balance due and unpaid after an effort to collect the notes? Without other explanation it affords an inference, at least, of an understanding such as was testified to by defendant.

The plaintiff De Camp denied the agreement testified to by Scofield upon the subject of first trying to get pay from Cooper before calling upon him. This issue of fact should have been submitted to the jury.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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THE CITY OF DETROIT v. LUTHER BEECHER AND MARY W. BEECHER.

Municipal corporations—Proceedings for opening street—Constitutionality of statute—Petition—Verification—Extension of street—Damages—Necessity of improvement.

1. Act No. 124, Laws of 1883, as amended by Act No. 48, Laws of 1887, is not unconstitutional in not providing for the payment for the land condemned before it is taken; and said statute, as a whole, provides for such a finding by the jury as the Constitution warrants. *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 641, 646, 647.

2. In a street-opening case the jury are not precluded from estimating and determining the whole cost of the improvement before they find the necessity for it, and the compensation of the individual owners is to be apportioned afterwards, as a natural sequence.

3. Under a statute providing that the jury in a street-opening case must "ascertain and determine whether there is necessity for taking (the land) for the use or benefit of the public," in order to find such necessity, the jury must determine that the *benefit* to the public will be equal to the *cost* of the improvement, which finding renders the question of local benefits entirely immaterial

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and irrelevant, as far as the necessity of the improvement is concerned. CHAMPLIN and LONG, JJ., dissent from this proposition.

4. A petition signed "The City of Detroit, by William S. Sheeran, City Attorney," is a sufficient compliance with a statute requiring it to be signed by said attorney in his official capacity.

5. Under a statute requiring a petition in a street-opening case to be verified by the city attorney, "or by some person having knowledge of the facts," an affidavit of that officer that "the petition is true to the best of his knowledge and belief" is sufficient.

6. The statute in relation to taking land by municipalities in this State does not require any attempt to secure the same by dedication or sale prior to the commencement of condemnation proceedings, which negotiations need not be alleged in the petition; and said statute is not unconstitutional by reason of this omission.

7. A petition stating that the object of a proposed public improvement is the opening and extending of a designated street between two streets, where not already opened, to a certain width, and that, in making and maintaining the proposed improvement, a perpetual right of way over the different pieces or parcels of private property described in the petition will be necessary, and that such right of way is proposed to be used for the purposes of a public street and highway, states fully enough, in "a general way," the nature and extent of the *use* of the land that will be required in making and maintaining the proposed improvement.

8. A variation of a few degrees in extending a street from its course is not prohibited by law, and is within the discretion of a city, if ratified by the finding of the jury that such course is necessary.

9. In the absence of an ordinance requiring streets to be fenced, a property-owner through whose land one is opened is not charged with such a duty; and, in the absence of evidence showing the necessity for such fencing, the condemnation jury is not warranted in allowing the expense of such fencing as an item of damages.

10. The expense of clearing snow from sidewalks along a proposed city street is not a proper element of damage to be allowed the property-owner through whose land it will pass, and a claim for the cost of grading and paving such street which might be assessed upon his adjoining property is also properly rejected.

11. The "additional expense" to be allowed a land-owner in a street-opening case is that naturally following such opening, like the removal of an existing fence (*City of Detroit v. Beecher*, 69 Mich.——, 37 N. W. Rep. 18), or the necessary expense of a rail-

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road company, whose right of way is taken, in making the crossing safe, and providing guards against accidents (*Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 648), which "additional expense" must be real, tangible, and proximate (*Flint & P. M. R. R Co. v. Detroit & B. C. R. R. Co.*, 64 Mich. 350).

12. The charge of the court defining the word "necessity" (see opinion, page 468) is held not erroneous nor misleading.

Appeal from the recorder's court of Detroit. (Gartner, J., presiding.) Argued February 8, 1889. Decided June 28, 1889.

Proceedings to open a street. Respondents appeal. Proceedings affirmed, except as to three parcels, for which nominal damages were allowed, and as to these a new appraisement is ordered. The facts are stated in the opinion.

Ervin Palmer, for appellants.

John W. McGrath, city counselor, and *Fred H. Warren*, assistant, for petitioner.

MORSE, J. In this case we are asked to review the proceedings, as far as the rights of the respondents are concerned, in the matter of opening and extending Eleventh street from Leverett street to Michigan avenue in the city of Detroit.

The street opening was intended to be conducted under Act No. 124, Laws of 1883, as amended by Act No. 48, Laws of 1887.

In the first place the constitutionality of the law is attacked on several grounds:

First. The act is framed so ambiguously that the jury are not required to determine upon the necessity of the proposed improvement, but only on the necessity of taking the land for the improvement, provided the improvement is made as designated.

Second. Under the law the jury cannot ascertain whether said improvement is necessary or not.

Third. Said act requires the jury to pass upon the neces-

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sity of said proposed improvement, without knowing or considering the public or local benefits which will accrue from the proposed improvements.

The *fourth* objection covers nearly the same ground as the third, and the two will be discussed together.

The *fifth, sixth, seventh,* and *ninth* relate to the laying of the tax to pay the cost of the improvement, and the compensation awarded to the land-owners, and under our view of the case need not be stated here.

The *eighth* objection is that the statute does not provide for the payment for the land condemned before it is taken, as provided by section 15, Art. 15, of the Constitution.

This indentical objection has been heretofore considered by this Court in *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 646, 647 (26 N. W. Rep. 159), and decided to have no merit.

The first objection,—

"That the act does not require the necessity of the proposed improvement to be determined by the jury,"—

Has been disposed of by this Court in *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 641, 646 (26 N. W. Rep. 161), where it was held that the statute, as a whole, provided for such a finding as the Constitution warrants.

Under the second objection we are referred to this provision of the Constitution (section 2, Art. 18):

"When private property is taken for the use or benefit of the public, the necessity for *using* said property, and the just compensation to be made therefor, * * * shall be ascertained by the jury," etc.

It is argued that, under sections 7 and 8 of the act, the jury pass upon the necessity of the proposed improvement before they know anything of the cost of the improvement, and that under the Constitution no public necessity can exist for the opening of a street unless the benefit to the public is at least equal to the value of the property taken, and that the oath to the jurors, as prescribed by section 7, and the manner in which they shall make up their verdict, as pro-

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vided by section 8, make it the first duty of the jury to determine–

"The necessity for taking such private property for the use or benefit of the public for the proposed improvement, and, in case they find that such necessity exists, they shall [then afterwards] award to the owners of said property, and others interested therein, such compensation therefor as they shall deem just." Sections 7, 8, Laws of 1883, Act No. 124.

It is contended that under these sections the jury are required to determine the necessity for the improvement before they are permitted to determine the cost of the same. We do not so understand the statute. The jury are not precluded from estimating and determining the whole cost of the improvement before they find the necessity of it. The compensation of the individual owners of the property is to be apportioned afterwards, as a natural sequence. It would be out of the natural order to award compensation to the owners before the necessity was established, and the Constitution requires no such absurd method of procedure in street openings.

The third and fourth objections urged are that the act does not require the jury to consider the public or local benefits which will accrue from the proposed improvement.

Under the theory that the law was defective in this respect, the counsel for the respondents requested the court to instruct the jury that they must find that the public benefits must be equal to the cost of said improvement, and that they must find that the benefits which the owners or occupants of real estate in the vicinity of the proposed improvements will receive, and which the common council of the city of Detroit may deem to be specially benefited and may include in a taxing district, equal the cost of said proposed improvement, or they cannot find the said improvement is a public necessity. The court gave the first part of the instruction, as to the public benefit, but refused the second, as to the local benefits.

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It is claimed that under this act the jury are only permitted to ascertain the compensation to be paid for the proposed improvement, and are not allowed to consider how much benefit the public generally will receive, or any particular benefit which said improvement will bring to a district in the immediate vicinity of the same, and that without such finding of public and local benefits the necessity for the improvement cannot be constitutionally determined.

We think the act does require the jury to consider the public benefit, and it is not objectionable in that respect. It is true, it does not state in so many words that the jury must find the benefit to the public to be equal to the cost of the improvement, but, when it provides that the jury must "ascertain and determine whether there is necessity for taking for the use or benefit of the public," it logically follows under the law as laid down in this State that, in order to find such necessity, the jury must determine that the benefit to the public will be equal to the cost of the work; and under a proper charge from the court they did so find in this case. It looks a little like hair-splitting to contend that every detail of the method by which the jury arrive at such necessity must be set out in the law.

In regard to the question of local benefits, the law, as amended (section 15, Laws of 1887, p. 52), provides that after the condemnation the cost of the improvement may be raised in whole or in part by a general tax, or in whole or in part by a tax upon the owners or occupants of taxable real estate within a taxing district to be fixed by the common council of the city of Detroit,—

"In proportion as nearly as may [be] to the advantage which such lot, parcel, or subdivision is deemed [by the council] to acquire by the improvement."

If the council do not determine to raise any of the tax upon the theory of local benefits, and the tax is laid generally, there is no occasion for the jury of condemnation to

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speculate upon the local benefits in determining the necessity; and, as they cannot well forsee what the common council will do as regards the spreading of the tax to pay for the improvement, we fail to see the object or use of their taking into consideration the local benefits in determining whether or not the land should be condemned. Certainly, if the jury consider, as they were instructed to in this case, the public benefit, and find such public benefit to equal or exceed the cost of the improvement, the matter of local benefits becomes entirely immaterial and irrelevant, as far as the necessity of the improvement is concerned.

We intimated in *City of Detroit v. Daly*, 68 Mich.——(37 N. W. Rep. 15) that the method of assessment of local benefits under this act, after condemnation by a jury, made by the ordinary assessing officers, was the better one, as it prevented the anomaly of different official valuations of the same property.

We find no constitutional difficulty as far as the action of the jury of condemnation is prescribed and set forth in the act.

We do not consider it necessary to discuss the other objections made by respondents' counsel to the constitutionality of this act, as they relate entirely to the possible assessment of benefits by the common council in the raising of the tax to provide for the cost of the improvement; but as the whole cost may be raised by general tax, and must be if not otherwise provided, the invalidity of the special provisions for laying the tax on a particular section of the city, if they are invalid, cannot affect the other parts of the act. If any special district shall be set apart for the purposes of taxation, the owners of the property assessed may have occasion for a remedy, but this cannot affect the proceedings here taken to condemn the respondents' land. *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 647 (26 N. W. Rep. 159).

We will now examine the errors alleged in the proceeding.

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It is claimed by respondents that the petition is incomplete in form, and does not set forth sufficient facts to enable the court to grant the prayer therein contained, or to give the court jurisdiction of the subject-matter of the proceedings.

The defects alleged are—

1. That the petition is not signed by the city attorney in his official capacity.
2. It is not duly verified.
3. The petition does not show, nor does the testimony disclose, any attempt to obtain the consent of respondents to dedicate or sell their land for the proposed improvement, and that such attempt has failed.
4. The petition does not state in a general way the nature and extent of the use of the land that will be required in making and maintaining the improvement, as required by law.

The *first* objection is so purely technical as to have no merit at all. The petition was signed by the city attorney as follows: "The City of Detroit, by William S. Sheeran, City Attorney." The statute provides that the petition shall be filed in the name of the city, and signed by the city attorney in his official capacity. As signed, it is as sufficient a compliance with the law as if it had been signed "William S. Sheeran, City Attorney." Act No. 48, Laws of 1887, § 3.

Second. The verification of the petition was by the city attorney, who made oath that he was city attorney; that he had read the foregoing petition by him subscribed, and knew the contents thereof; and that the same was true, to the best of his knowledge and belief. The act requires that the petition "shall be duly verified" by the city attorney, "or by some person having knowledge of the facts." Act No. 48, Laws of 1887, § 3.

It is contended by respondents that the provision that it must be duly verified by some person having knowledge of the facts, if the city attorney does not verify it, imports also that the city attorney must have knowledge of the facts, and that he cannot fulfill the demands of the statute by swearing

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that the petition is true "to the best of his knowledge and belief," but that he is required to make oath that the facts stated in the same are known to him, and are true. It is also urged that, in all cases where the statute requires the verification by one having knowledge of the facts, a jurat upon information and belief is not sufficient.

We are cited in support of this claim to *Teachout's Case*, 15 Mich. 346; *Proctor v. Prout*, 17 Id. 473; *Brown v. Kelley*, 20 Id. 33; *Hackett v. Wayne Circuit Judge* 36 Id. 334; *Swart v. Kimball*, 43 Id. 451 (5 N. W. Rep. 635).

All these cases are those in which a *capias* or warrant had been issued upon an affidavit stating the facts upon which the cause of action was based. It has uniformly been held in such cases that the material facts must be shown by the affidavit to be within the knowledge of the affiant, and cannot be stated on information and belief.

The counsel for the petitioner insist that this rigid rule, which is invoked in aid of the personal liberty of the individual, is not applicable to this proceeding; that the verification as made by the city attorney in this case is certainly as strong as he could possibly make it. Nearly all the matters contained in the petition are either matters of public record, pertaining to the action of the common council in the premises, or the statement of the action of some one other than the city attorney himself.

It is argued that this information comes to him through official sources, and, when he, as a public officer, has sworn that the same is true to the best of his knowledge and belief, the same is "duly verified" within the meaning and intent of the statute.

We are inclined to take this view of the question. The act does not in terms provide that the city attorney must swear that he has personal knowledge of the facts, and we know of no good reason for such a requirement. If the petition is verified by some one else, there may be reason why

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such person should have knowledge, and so state under oath, but that question is not here.

The only object of this verification must be to secure good faith in the institution of the proceedings, and to protect land-owners from the expense of defending their rights in needless or wanton attempt to condemn their lands; and as the basis of the proceedings, which is to be set out in the petition, is the action of the common council in the first place, declaring the improvement to be a public necessity, and the city attorney, before instituting the proceedings, must be directed to do so by a resolution of the common council, and the certificate of such action of the council attached to the petition is made *prima facie* evidence of the action taken, a verification that the city attorney knows such action to have been taken would seem to be entirely superfluous and unnecessary; and such action would also seem to be a sufficient guaranty of the good faith of the proceeding.

The other facts required to be stated are that the petition is made and filed as commencement of judicial proceedings under the act to acquire the right to take private property for the use or benefit of the public, without the consent of the owners, for a public improvement, designating it, for a just compensation to be made; also a description of the property is to be given, and generally the nature and extent of the use thereof, which will be required in making and maintaining the improvement, shall be stated, and the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises; that the common council have declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use and benefit of the public. See Act No. 48, Laws of 1887, §§ 2, 3, pp. 49, 50.

The same reasons given in *Washburn v. People*, 10 Mich.

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372, why the verification of a criminal information filed by the prosecuting attorney upon information and belief was sufficient, would seem to apply with even greater force to this petition. It is filed and signed by a public officer, whose duties as such public officer make him more familiar with the proceedings precedent to the filing of the same, and the facts therein to be stated, than any other person; and yet such a statement of facts is required as would not be often capable of verification upon the actual personal knowledge of any one man. The proceedings before the filing of the same, and necessary before it can be filed, are such that the good faith of the undertaking of the improvement is sufficiently guaranteed, and the land-owners protected against groundless or vindictive proceedings to condemn their lands; and the presumption of good faith also attaches to the act of the public officer in filing the same. We therefore think the verification sufficient.

Third. The statute in relation to the taking of land by municipalities within this State, unlike the law in relation to the condemnation of lands for railway purposes, does not require any attempt to obtain the consent of the owners to dedicate or sell their lands for the purposes of the proposed improvement, and that there shall be shown such attempt, and failure to obtain such consent, before the proceedings to condemn shall be instituted; therefore, it is not necessary that the same shall be alleged in the petition; and the act has been declared not unconstitutional because of this omission. *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 645 (26 N. W. Rep. 159).

Fourth. We think the petition states fully enough in a "general way," the nature and extent of the use of the land that will be required in making and maintaining the improvement, as required by law.

It states the object of the improvement to be the—

"Opening and extending of Eleventh street from Leverett

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street to Michigan avenue, where not already opened, 60 feet wide; and that in making and maintaining the proposed improvement, a perpetual right of way over the different pieces or parcels of private property hereinafter described will be necessary; and that such right of way is proposed to be used for the purpose of a public street and highway."

It is difficult to see what more is needed to fulfill the requirements of the statute in this respect.

It is urged by the respondents' counsel, in this respect, that the summons notified the respondents that—

"The object of said petition is to open and extend Eleventh street from Leverett street to Michigan avenue, where not already opened, 60 feet wide, for the use and benefit of the public as a public street and highway."

That the law provides that the summons shall "state briefly the object of said petition;" that the testimony showed that Eleventh street, as now existing, was a half mile south of the proposed improvement, and, if the street should be extended northerly on a straight line, it would run about 350 feet east of the proposed street.

The petition, however, contained an accurate description of each parcel of land to be taken for the proposed improvement, and we apprehend that the naming of the proposed street as an extension of Eleventh street was of no moment. The land to be taken was stated, and the jury, under the proceedings, found that it was necessary to take such land for the use and benefit of the public; and what the proposed street was named, either in the petition or summons, was immaterial, if the object and location of the proposed improvement was plainly set forth. The fact that Eleventh street, if continued in a straight line northerly, would be, at the southerly point where the improvement commenced, some 300 or 400 feet to the east of the proposed line in the petition, would not vitiate the proceedings, as we know of no statute compelling the course of a street, when extended, to continue as to direction exactly in the same line of the exist-

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ing street. The variation of a few degrees in this case to the east or west is not prohibited by law, and is within the discretion of the city, if ratified by the finding of the jury that such course is necessary. It would still be an extension of Eleventh street.

We will now examine the objections to the charge of the court.

The counsel for respondents requested the court to instruct the jury that they were entitled to the cost of building a fence on each side of the proposed street. I think the court correctly instructed the jury that, as there was no ordinance in the city of Detroit requiring streets to be fenced, it was not incumbent upon the respondent Beecher to do so. No good reason was shown in the testimony why such fences would be necessary. The land of the respondent Beecher, proposed to be taken for the street, had been platted, and the plat recorded in 1873, into streets, alleys, and city lots. It is quite common now to use such lots, both for residence and other purposes, unfenced on the line of streets. The jury were certainly not authorized to award Mr. Beecher damages for fencing his property on both sides of the proposed street, unless such fencing was shown to be necessary, and no such showing was made. As to the matter of sidewalks, the court left it to the jury to find whether he should have compensation or not for building them.

His counsel claimed that he was not only entitled to this, but to the expense of cleaning the snow off from the same for many years to come. This was very properly not allowed by the court.

He also insisted upon damages for the cost of grading and paving the street that would or might be hereafter assessed upon his adjoining property. This claim was also rightfully rejected by the court. It was not in the power of the jury to determine what this expense would be, or anywhere near it, nor yet to know whether or not the street would ever be

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paved. The common council might not order the street to be paved; and, if they did, they might order it paved to one width or another, and of one material or another.

The damages for these possibilities of the future are too remote, contingent, and speculative to be determined with any accuracy, nor do we consider that the law contemplates the giving of any such damages, nor does the Constitution require it. All these improvements, in the line of grading and paving and otherwise improving streets, cast burdens upon the land-owners, it is true, but at the same time they enhance the value of their land, and the proportion of increase of value is supposed to equal, if not to exceed, the increased burden; and upon this theory, and this alone, can the land-owner be taxed to grade or pave a street, unless he pays such tax as one of the general public, and not upon the theory of benefits, by which a tax is imposed upon adjoining lands in proportion as they are benefited by the improvement.

The court instructed the jury that they must award to the owners of the land full compensation,—

"Which means that you are to award to the owners of the land the full value of the land to be taken, and all additional expense entailed upon said owners in opening said street."

This charge gave to Mr. Beecher, if followed, all that he was entitled to under the law.

The additional expense covered by the law is the expense that naturally follows the opening of the street, like the removal of a fence already built (see *City of Detroit v. Beecher*, 69 Mich. ——, 37 N. W. Rep. 18), or the necessary work and expense of a railroad company, whose right of way is taken for a street or public highway, in making the crossing safe, and providing guards against accident. See *Grand Rapids v. G. R. & I. R. R. Co.*, 58 Mich. 648 (26 N. W. Rep. 159).

This expense to be allowed as damages must be real, tangi-

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ble, and proximate. It cannot be allowed on mere conjecture, fancy, speculation, or imagination, nor can it be remote or contingent on something that may or may not happen, and it must be capable of ascertainment. See *Flint & P. M. R. R. Co. v. Detroit & Bay City R. R. Co.*, 64 Mich. 350 (31 N. W. Rep. 281), and cases cited.

Fault is also found with the charge of the court in his definition of the word "necessity," and it is claimed that his instructions in this respect were misleading and erroneous. The court told the jury in this regard that they—

"Must find from the evidence that the benefits which the public will derive from said proposed improvement will equal the cost of the same, or you cannot find that said proposed improvement is a public necessity;"—

And that, in the language of one of respondents' requests,—

"You must first estimate the land to be taken at its full cash value, and then, if you find the public generally will not be benefited to the amount of said value, you cannot find the improvement to be a public necessity;"—

Also, that it must be a present public necessity, and,—

"With regard to public necessity, the public must be interested. Every part of the public is interested in every other part of the city of Detroit. Anything that tends to beautify, adorn, and make more desirable, as a place of residence or a place of business, one part of the city, adds to the value of the property in every other part, and is a benefit to the city generally. In other words, gentlemen of the jury, every part of the city is interested in beautifying and adorning every other part. You should be satisfied that the benefit to the public will be so great that it can afford to pay the entire expense of opening it, and that the benefit to the public will more than pay for the cost and expense of opening it, and the inconvenience attending it; and, unless you so find, there is no public necessity. You must also be satisfied that the public will be so much benefited that it can afford to pay the damages; and, unless you are satisfied of all these things, it is your duty to declare it to be unnecessary."

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We see nothing erroneous or misleading about these instructions.

There were three parcels of land described in the petition for each of which, under the charge of the court, the jury allowed simply nominal damages. One parcel was part of an alley in block 3 of Luther Beecher's subdivision of part of Lognon farm. One parcel was part of Church street, of the same subdivision, and the other parcel was part of an alley in block 2 of the same subdivision.

It appears that Mr. Beecher platted this land in 1873, and part of the plat has been opened to the public. The part of Church street and the alleys condemned and taken under these proceedings have never been accepted by the city in any way. Last year Beecher fenced up Church street where it was not used by the public. He testified that he was ready to open it, and intended to do so when he sold lots upon it.

We think Mr. Beecher was entitled to the full value of these three parcels of land. No one, save himself and wife, had any interest in them.

Something more than a mere offer of dedication by platting is necessary in order to give the public the right of a street or highway. There must be an acceptance on the part of the public; and an acceptance of a part is not an acceptance of the whole. The respondent had the right to fence up Church street where he did, as against the city of Detroit. *Field v. Manchester*, 32 Mich. 281.

The testimony upon both sides is to the effect that the land taken was open to the commons and used as a cow pasture, and the city had never exercised any control over, or done any work upon, that portion of Church street proposed to be taken for the purposes of a street in this proceeding. The city had no title to or easement in this Church street, or either of the alleys upon Beecher's plat, nor is any right

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shown in the public that would prevent the closing of them by Mr. Beecher, if he saw fit to do so.

What he intends to do with this land, if certain contingencies occur, is not material. He has a right to keep his property, or to receive full compensation for it if it is taken on the ground of public necessity.

We find no errors in the admission of testimony, nor are we disposed to meddle with the finding of the jury as to the value of the land to be taken, except in the case of the three parcels heretofore mentioned.

The proceedings, therefore, are affirmed, with the exception of the three parcels above mentioned. As to these there must be a new appraisement. The costs of this Court will be given to the respondents.

CAMPBELL, J., concurred with MORSE, J.

CHAMPLIN, J. I concur in the *result* reached by Mr. Justice MORSE, but I desire to express my dissent from the proposition stated in the opinion to the effect that private property cannot be taken for the use of the public unless the benefit to the public will be equal to the cost of the work, or that the jury cannot determine that the public necessity requires the taking of private property for the public use unless they can determine also that the public will be benefited as many dollars and cents as the damages and compensation to individuals are determined to be. I am not aware that this Court has ever enunciated such doctrine.

Under a city charter, where the statute prescribes that the total damages and compensation awarded shall be assessed upon a specified district in proportion to the benefits derived from making the improvement, I can see that the property cannot be taken unless the benefits equal or exceed the damages or compensation; but this is for the reason that the Constitution provides that private property shall not be taken for the public use unless compensation is first made or secured as

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shall be provided by law; and, if the total damages and compensation exceed the total benefits to be assessed upon the district, it is clear that compensation cannot be made, and the proceedings fail for that reason. It is because in such case the law has failed to provide for compensation, and not because the public necessity does not exist. When the law does provide for the payment of the damages and compensation, the jury need not inquire whether the public necessity for taking or using the property is equal to the compensation to be made.

The public necessity cannot be measured by mere dollars and cents. There is no provision in the Constitution which prohibits private property from being taken for the public use unless the benefit to the public is equal to the damages and compensation to be awarded to the owners of property so taken. Private property may be condemned for the use of the public for court-houses and jails. Must the jury determine that the benefit to the public is equal to the damages and compensation awarded before they can determine the necessity? Private property may be taken for the use of the public for highways. Cannot a highway be opened unless the commissioner first determines that the public benefit equals the damages and compensation awarded? Private property may be taken for public use in the construction of railroads. Must the jury first determine whether the public use or benefit will be equal to the damages and compensation awarded before they can determine the necessity for taking the property for public use? The public necessity cannot be measured by the amount of damages and compensation to be awarded for the property taken. Such a rule would be both impracticable and impossible of application.

LONG, J., concurred with CHAMPLIN, J.

SHERWOOD, C. J., did not sit.

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BERTHA WORMSDORF v. THE DETROIT CITY RAILWAY COMPANY.

Negligence—Pleading—Concurring negligent acts—Use of cars by street railway company—Evidence—Statements as to cause of accident—Reputation of horse as unsafe.

1. Where, in an action for negligence, the accident and resulting injury are alleged as having been caused by several *concurring* negligent acts and omissions of the defendant, *each* element of negligence must be proved to warrant a recovery.
2. A street railway company is not required to furnish its road with *new* cars, nor is it liable for using *old* ones, but, in *either* case, must keep them in good repair, and fit for use, so as not to endanger the safety of passengers.
3. Evidence of general knowledge and rumor among the employés of a street railway company that a car had been on the road ever since it was built is hearsay and irrelevant in a suit for injuries received by a passenger.
4. Proof of the general reputation of a horse, driven before a street-car, among the drivers and employés of the company, as unsafe and unreliable, is admissible as tending to show the negligence of the company in providing such an animal, and using it after the company knew or should have known the unfitness of the horse for the work.
5. In a suit against a street railway company for injuries received by a passenger, the testimony of a witness to a conversation between the driver and the superintendent, *after* the accident, in which the driver stated that he had reported the car as having a bad brake, etc., is inadmissible to bind the company with notice of the defect claimed.

Error to Wayne. (Reilly, J.) Argued April 17, 1889. Decided June 28, 1889.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Brennan & Donnelly and *Sidney T. Miller*, for appellant.

Henry Ohrns (*S. E. Engle*, of counsel), for plaintiff.

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CHAMPLIN, J. This action was brought to recover damages arising from an injury to plaintiff while riding upon a street-car.

The negligence of the defendant was alleged to have consisted in neglecting to furnish proper and safe brakes and appliances for slacking the speed of cars in going a down grade, or for stopping a car, and in wrongfully and negligently furnishing and providing a braking apparatus with a weak, cracked, and defective connecting rod, which was utterly inadequate, unsafe, and positively dangerous to life and limb; that the rod was partly cracked and broken, and its situation and location under the car was open and exposed to view, and the defendant, by the exercise of ordinary care, could and would have known of the unsafe condition of said rod and braking apparatus, and did know thereof; and that in going over a bridge above the tracks of the Michigan Central Railroad, and descending the grade thereon westward, the said connecting rod broke asunder, rendering the front brake useless, so that the driver was powerless to check the speed of the car.

Also in neglecting to provide the car with a conductor to apply the rear brake, and conduct and assist in the care of the passengers.

Also in providing and furnishing as one of the team a dangerous and fractious horse, which had for a long time before then been known to defendant to be dangerous and at times unmanageable; and that the horses became frightened and unmanageable, and the cars rushed upon their heels, and they ran away.

Also in the neglect of the driver of the car in which the plaintiff was a passenger, which was going east, to stop and permit her to alight, but wrongfully and negligently accelerated the speed of his horses, so that the two cars came together with a crash.

The declaration alleges that by means of the premises afore-

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said, and the wrongful conduct and negligence of the defendant and its driver aforesaid, the plaintiff was injured as stated in the declaration.

The declaration contains but one count, and the accident and resulting injury are alleged as having been caused by the several concurring negligent acts of and omissions of defendant. Had the connecting rod not broken, although the horse was fractious, and although there was no conductor, and although the driver of the east-bound car did accelerate his speed, and had not stopped and suffered the plaintiff to alight, the injury would not have been received by plaintiff. And so, if either duty upon the violation of which negligence is predicated had been performed, the accident would not have happened. It was necessary to the plaintiff's case under the pleadings to establish by proof each element of negligence alleged.

The testimony introduced by the plaintiff tended to show that Mr. Barry was superintendent of the road, and had general charge of the cars, horses, and men used and employed upon defendant's road, or at least of that portion of it upon which the accident happened.

The defendant was in duty bound to furnish and provide suitable cars, with proper and safe appliances for checking the speed of the cars on a descending grade, and for stopping them as necessity or convenience required, and to keep the same in good repair, and to provide safe horses for the transportation of passengers, and careful and prudent drivers. The defendant, however, is not liable as an insurer of the safety of its passengers, and is only liable for any injury which may happen through its own negligence or default, or the negligence or default of its servants.

There is no principle of law which requires the defendant to furnish its road with new cars to transport passengers, or which makes it liable for using old ones. Whether new or

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old it is required to keep them in good repair, and fit for use, so as not to endanger the safety of passengers.

Plaintiff's counsel was permitted to ask his witness this question:

"Was it a matter of general knowledge and rumor among the men that this car had been on the road ever since it was built?"

The witness answered:

"Yes, sir; that was all the talk about there. Men who were there on ahead of me, that left the road before I went there, told me that this car was on there just after the road started running."

The court erred in admitting this testimony. It was not only hearsay, but entirely irrelevant to the issue.

It was shown that one of the horses which was attached to the car that collided with the one in which plaintiff was injured, known as "Gray Fannie," was a fractious and ungovernable horse, and required great care and skill at all times to handle. Knowledge of these facts was brought home to Mr. Barry, the superintendent of the company, which was sufficient to charge defendant with notice and knowledge of the unsafe disposition and habits of the animal, but in addition the plaintiff was permitted to show the general reputation of the horse "Gray Fannie" among the drivers and employés of defendant for being an unsafe and unreliable horse to drive before a street-car, and her propensity to run if anything came against her heels, as tending to prove that defendant had notice of the unfitness of the animal for street-car service, and retained it therein after it had such notice or knowledge. The defendant claims that such testimony was merely hearsay, and inadmissible.

The testimony was clearly admissible as tending to show the negligence of defendant in providing an unsafe horse, and using it after it knew or should have known its unfitness for the work. *Davis v. D. & M. R. R. Co.*, 20 Mich. 105;

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Hoyt v. Jeffers, 30 Id. 181; *Hilts v. C. & G. T. Ry. Co.*, 55 Id. 437 (21 N. W. Rep. 878).

The testimony tended to show that within a few minutes after the collision the superintendent, Mr. Barry, arrived at the place, and the court permitted a witness to testify that Mr. Barry asked the driver of the west-bound car what the cause of the accident was, and the driver's reply that he thought it was because the brake-chain broke.

This perhaps was admissible as part of the *res gestæ*, under our ruling in the case of *Keyser v. C. & G. T. Ry. Co.*, 66 Mich. 390 (33 N. W. Rep. 867). But it was error to permit another witness to testify to a conversation which he claimed he heard between Mr. Barry and the driver immediately after the accident, as follows:

"The driver told Mr. Barry that he had reported the car to the barn, as having a bad brake; that he had reported the car to the barn before; that he didn't hear Barry ask anything as to the cause of the accident."

This narration of the driver was of a past transaction, and was no part of the *res gestæ*, and was inadmissible to bind the defendant with notice of the defect claimed.

The court charged the jury that there were four grounds of recovery, and that they might all stand or fall separately, and that, if they had satisfied the jury that the accident was caused by the negligence of the defendant upon either of the grounds stated, although they had failed in respect to the other three grounds, the plaintiff was entitled to recover.

We do not think the pleadings will support this portion of the charge. The declaration alleges wherein the defendant was negligent, and then alleges that by means of the premises aforesaid, which premises were the concurring acts of negligence set out, the accident occurred. There are four several acts of negligence alleged, but neither, alone, is said to have caused the injury, but the combined acts are alleged to have done so. If the breaking of the connecting rod was

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purely accidental, and occurred without the fault or neglect of defendant, and the car rushed upon the horses upon the descending grade, and the defendant was not at fault in the team running away, I do not think the declaration is so drawn as to place the company in fault for the sole neglect of the driver of the east-bound car to stop and invite his passengers to alight. It would have to contain allegations of fact directly contrary to what is now charged. *Thompson v. F. & P. M. R. R. Co.*, 57 Mich. 300 (23 N. W. Rep. 820).

The judgment must be reversed, and a new trial ordered.

MORSE, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

OTIS R. JOHNSON v. ISAAC L LYON.

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Contract—Time of performance—Non-happening of event—Excuse of performance—Pleading.

1. Where the *time* of performance of a contract, as fixed by the parties, becomes impossible by reason of the non-happening of an event, a contingency not contemplated by the parties, and no other time has been agreed upon, performance is excused.

   So *held*, where, pending an appeal from a circuit court judgment, a party agreed to pay $25,000 not later than the time set by the appellate court for the payment of said judgment, which was reversed by said appellate court, and the case remanded to the circuit court, where a new judgment was rendered.

2. It is not competent, by pleading a change of circumstances from those the parties contemplated and engaged with reference to as to time of performance, which always forms an essential element in every contract, to substitute a new condition and different time.

Error to Wayne. (Gartner, J.) Argued April 19, 1889. Decided June 28, 1889.

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Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Griffin, Warner, Hunt & Berry, for appellant.

F. H. Canfield, for defendant.

CHAMPLIN, J. This case was submitted upon briefs without oral argument. An amended declaration was filed in the court below, and a demurrer was interposed thereto. The plaintiff joined in demurrer, and upon argument the court entered an order sustaining the demurrer. From the final judgment sustaining the demurrer the plaintiff has brought the case here by writ of error.

The declaration is quite lengthy, and is as follows:

"AMENDED DECLARATION.

"STATE OF MICHIGAN.

"*The Circuit Court for the County of Wayne.*

"COUNTY OF WAYNE—*ss.*

"Otis R. Johnson, plaintiff in this suit, in this his amended declaration complains of Isaac L. Lyon, defendant herein, and thereupon the plaintiff avers:

"For that whereas, prior to and during the year 1867, Titus G. Fish and Abner C. Fish were partners in the business of manufacturing wagons at Racine, state of Wisconsin, under the firm name of Fish Bros., and, becoming embarrassed in said business, and indebted to numerous persons, including one Jerome I. Case, who was a relative of said Fish Bros., and apparently desirous of aiding and assisting them in said business, made an arrangement with said Case, whereby, among other things the said Case was to buy the outstanding indebtedness of the said Fish Bros., and they were to transfer to him their assets, and Case was to allow them to run and manage the business for him, and as his agents, and they were to manufacture the stock on hand, and to market the same, until they should be able and should pay the advances so made by Case, with interest, together with the indebtedness owing to him, and all expenses, after which the remaining assets and properties, if any, should be returned and belong to said firm of Fish Bros.

"And whereas, in pursuance of said agreement, the busi-

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ness was continued and carried on under the name of Fish Bros., agents, until sometime in the year 1871, when one Edwin B. Fish acquired an interest of one-eighth of the interest of said Fish Bros. in the said business, and afterwards, to wit, in 1874, Abner C. Fish sold and transferred his interest in the business, so that the former interest of Fish Bros. in said business became that of Titus G. Fish, Edwin B. Fish, and John C. Huggins, and was afterwards conducted and carried on under the name and style of Fish Bros. & Co., agents.

And whereas, afterwards, to wit, in the year 1880, a contest arose between the said Fish Bros. & Co. and the said Jerome I. Case, as to the proper construction and interpretation of the original agreement of 1867, and of the rights of the respective parties thereunder, and the amount which said Case was entitled to receive, and when the same was payable, which resulted in a litigation commenced by the said Case as plaintiff, in the year 1880, in the circuit court for the county of Racine, a court of general jurisdiction in the state of Wisconsin, against Titus G. Fish, Edwin B. Fish, and John C. Huggins, as defendants; being substantially claimed on the part of Case that said agreement of 1867 constituted him the owner of the business, with the right on the part of Fish Bros. & Co. to receive the same back upon repayment of said Case's advances therein, and claimed by Fish Bros. & Co. that said agreement was a transfer of property by way of security, and establishing between the parties thereto the relation of creditor and debtor only.

"And whereas, at or about the time of commencement of said suit, to wit, in December, 1880, Case obtained an injunctional order against the defendants, and gave notice to creditors of the business, among other things, that the agency had been revoked, and that he refused to be further bound by any act or contract of the said Fish Bros. & Co.; and thereafter, though said litigation was pending, the said Fish Bros. & Co, under their claimed interpretation and meaning of the agreement of 1867, and assuming and asserting a large and valuable interest in said business over and above the interest by way of security or otherwise of the said Case, continued to carry on and conduct the business under the name and style of 'Fish Bros. & Co.'

"And whereas, afterwards, to wit, in the latter part of the year 1882, the said circuit court for Racine county adjudicated substantially, among other things, that the relation between the said Case and Fish Bros. & Co., under the agreement of

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1867, and the continuance and conduct of the business thereafter, was in legal effect that of creditor and debtor, and entered a judgment in favor of Case and against Fish Bros. & Co. for a large sum of money, to wit, the sum of more than eighty thousand dollars, and which by the terms of said judgment was to be paid within a certain time, to wit, within seventy days from the date thereof, from which said judgment of said circuit court both parties appealed to the supreme court of the state of Wisconsin.

"And the plaintiff avers that during the pendency of said appeal, to wit, in the month of January, 1883, one Stephen S. Lyon entered into negotiations with said firm of Fish Bros. & Co. to purchase a one-eighth interest of the interest of said Fish Bros. & Co., in the business aforesaid, acquired by said Fish Bros. & Co., hereinbefore particularly set forth, whatever that interest might then be, or should thereafter be determined to be; and afterwards, to wit, on the twenty-fourth day of January of the same year aforesaid, it was then and there agreed by and between said Fish Bros. & Co. and said Stephen S. Lyon that said one-eighth interest of the interest of the said Fish Bros. & Co. in the business aforesaid should be sold by said Fish Bros. & Co to said Stephen S. Lyon, and bought by him, for the sum of fifty thousand dollars; and it was part and parcel of said agreement that said Lyon should furnish, and said Fish Bros. & Co. should accept, as a first payment upon said purchase, the obligation of said Isaac L. Lyon, the defendant herein, to pay the sum of twenty-five thousand dollars, and that said obligation should be received and treated by said Fish Bros. & Co. as so much cash paid upon said purchase.

"That thereupon, with full knowledge of said negotiations and agreement, and for the purpose of making said first payment upon said purchase, said defendant made, executed, and delivered to said Fish Bros. & Co., of Racine, aforesaid, a certain obligation in writing, bearing date the twenty-sixth day of January, 1883, in the words and figures following, to wit:

"'DETROIT, Jan'y 26, 1883.

"'MESSRS. FISH BROS. & CO.,—

"'*Gents:* In accordance with your proposition to Stephen S. Lyon, of Racine, Jan'y 24th, 1883, I will guarantee to pay you twenty-five thousand dollars not later than the time set by the supreme court of Wisconsin for the payment of the Case judgt; you to furnish me, if I require it, Fish Bros. & Co. paper for fifteen thousand dollars, to

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be used by me as accommodation paper, to be provided for and paid by me.

"'Yours truly,

"'I. L. LYON.'

"Wherein and whereby said defendant undertook and agreed to pay to said Fish Bros. & Co., in part payment for the said one-eighth interest, the sum of twenty-five thousand dollars, as therein provided; that said obligation in writing was duly accepted by said Fish Bros. & Co. as and for the sum of twenty-five thousand dollars of said purchase price; and thereupon, relying upon said written obligation of the defendant, said one-eighth interest of the interest of said Fish Bros. & Co. in the business aforesaid was actually sold, transferred, and made over by said Fish Bros. & Co. to Stephen S. Lyon, and he became the owner thereof.

"Plaintiff further avers that, in considering the time within which payment of the said written obligation was to be made, it was contemplated by the said Fish Bros. & Co., and the said Stephen S. and Isaac L. Lyon, that the supreme court of Wisconsin, in determining the various questions arising on the appeal aforesaid, would, among other things, adjudicate and fix the time within which the said Fish Bros. & Co. should pay to the said Jerome I. Case, the said sum of more than eighty thousand dollars, or such other sum, if any, as the supreme court should decree to be payable to the said Case, as was done in the said circuit court for the county of Racine, as hereinbefore alleged; and it was the purpose of the parties aforesaid that the payment of said written obligation would create and constitute a ready fund with which to pay, in whole or in part, the said amount, if any, which said supreme court should determine to be payable to the said Case; and the provision in said obligation for payment, 'not later than the time set by the supreme court of Wisconsin for the payment of the Case judgment,' was inserted in view of this expectation and purpose of the parties aforesaid.

"That afterwards, to wit, in May, 1883, the supreme court of Wisconsin reversed said judgment of said circuit court, and remanded the cause to said circuit court for a restatement of the account between the parties thereto, in accordance with the opinion of said supreme court; and said supreme court did not at any time fix the time of payment to be made to the said Jerome I. Case of any sum or sums whatever, but left the said circuit court to grant such relief as might be necessary for the protection and security of the rights of the parties, including the methods and times of

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payment to be made to said Case of whatever sum or sums should be found to be due to him upon a restatement of said account, and to determine and control all other matters of detail under instructions given in said opinion of said supreme court.

"Plaintiff further avers that said cause was thereupon remanded to said circuit court, and afterwards, to wit, on October 16, 1883, the said circuit court, for the further protection of the rights of the parties, appointed said Jerome I. Case receiver of the property and assets of said Fish Bros. & Co.; and thereupon the property, assets, and business of said Fish Bros. & Co., and all the right, title, and interest of said Fish Bros. & Co. in and to the business hereinbefore particularly set forth and described, was duly transferred, under the order and directions of said court, and in accordance with the practice thereof, by the said Fish Bros. & Co. to said receiver; that among other things so transferred was said written obligation of the defendant; that afterwards, to wit, sometime in the year 1884, the said circuit court for the county of Racine, acting under and in pursuance of the instructions of said supreme court, rendered a judgment in favor of said Case, and against the defendants in said suit, for a large sum of money, to wit, the sum of more than $200,000, and said defendants were given, by the terms of said judgment, six months from the entry thereof to pay said sum; and the plaintiff avers that the said circuit court is the only court that at any time has fixed the time within which either the first or the last Case judgment should be paid; and that, in view of the facts aforesaid, the said written obligation became due and payable, at least within a reasonable time after the determination of the controversy, and the final judgment in said circuit court, and after the expiration of the time fixed by the said circuit court for the payment of said Case judgment; and that more than a reasonable time has elapsed, and no part of said written obligation has yet been paid, nor has the said sum of twenty-five thousand dollars agreed to be paid as part of the purchase price of the said one-eighth interest of the interest of Fish Bros. & Co. in said business hereinfore particularly set forth, or any part thereof, been paid by the said Stephen S. or Isaac L. Lyon, or any other person.

"Plaintiff further avers that afterwards, to wit, in September, 1885, said Jerome I. Case resigned as receiver, aforesaid; that his resignation was accepted, and Ahira W. Hall was, in said cause, appointed by said circuit court his succes-

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eor, and the said written obligation of the said defendant was, among other things, transferred by said Jerome I. Case as said first receiver to said Ahira W. Hall as his successor, and said written obligation was taken possession of by said Hall as said second receiver; that afterwards, to wit, in December, 1886, the said Hall, as second receiver, being duly authorized, thereupon, by the order of said circuit court, did transfer and set over the said written obligation of said defendant to the said plaintiff, and the said plaintiff is now the owner, holder, and possessor thereof.

"Plaintiff further avers that, after the rendition of said judgment in said circuit court as hereinbefore particularly set forth, and after the expiration of the time fixed by said circuit court for the payment of the same, to wit, before the commencement of this suit, in January, 1887, said Fish Bros. & Co. fully satisfied the claims of said Case adjudged by the said circuit court to exist against them; and the said Case judgment so rendered by the said circuit court as aforesaid was satisfied, and said judgment canceled and discharged; and the title to said written obligation of said defendants, so far as it required any confirmation, was then and there confirmed and ratified by said Fish Bros. & Co., as being and existing in said plaintiff.

"And the plaintiff further avers that the said defendant never, at any time, required of said Fish Bros & Co., the accommodation paper mentioned in said written obligation; that, by reason of the premises aforesaid set forth, said defendant became liable to pay said plaintiff the sum of money in said written obligation named, and, being so liable, promised to pay the same; yet the said defendant has not paid the same, or any part thereof,—to the plaintiff's damage fifty thousand dollars; and therefor he brings suit, etc.

"GRIFFIN, WARNER, HUNT & BERRY,
"Attorneys for Plaintiff."

The causes for demurrer were specified as follows:

"1. That it does not appear from said declaration that the time mentioned in the obligation or guaranty therein set forth, and alleged to have been made and executed by said defendant for the payment of $25,000, has elapsed, or that said obligation or guaranty has become due or payable, or that any right of action has accrued to the plaintiff therein.

"2. That it appears from said declaration that time for the payment of the Case judgment referred to in said alleged

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obligation has not been fixed by the supreme court of Wisconsin, and that the aforesaid obligation or guaranty has not become due or payable.

"3. That it does not appear from said declaration that the said plaintiff has any cause of action against the defendant.

"4. That said declaration is uncertain and argumentative in its averments as to the time when said alleged obligation was intended to become due and payable.

"5. That the averment of said declaration, respecting the time when said alleged obligation was intended to become due and payable, is contradictory of the terms of said alleged obligation as set forth in said declaration, and that said declaration is therefore in this and in other respects repugnant."

In support of the demurrer the defendant contends that the obligation or agreement which is the foundation of the action is in its nature a guaranty, and defendant is entitled to stand upon the very letter of his contract, and is not to be held liable unless he is made so by the very terms of his agreement; that the declaration does not show that the time for the payment of the $25,000 mentioned in the guaranty has elapsed, or that any cause of action had accrued at the time the suit was commenced; that it is clear from the language of the obligation that the $25,000 was to be paid within the time, or at the expiration of the time, fixed by the supreme court of Wisconsin for the payment of the Case judgment; that the fixing of such time was made either a condition precedent to the defendant's liability to pay the $25,000, or a contingency upon which the liability depended.

If it was a condition precedent, defendant contends it must be strictly fulfilled; and, if it was a contingency, it had the effect of suspending the right to the performance of the promise until the occurrence of the contingent event, and defendant's liability cannot be enforced without showing that the liability has occurred.

In support of the foregoing contention the counsel for defendant cites Anson, Cont. *295–*298; 1 Story, Cont. § 27; 2 Benj. Sales, § 753; *Brogden v. Marriott*, 2 Bing. N. C.

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473; *Worsley v. Wood*, 6 Term R. 710; Wald's Pol. Cont. 356; *Gill v. Vogler*, 52 Md. 663; *Mosher v. Railway Co.*, 127 U. S. 390 (8 Sup. Ct. Rep. 1324).

Defendant further insists that the declaration shows that the judgment which was referred to in the guaranty sued upon was the judgment for $80,000, which had been rendered by the circuit court, and appealed to the supreme court; that the parties did not intend or refer to any other judgment which might be rendered in the suit; neither did the parties contemplate that any court except the supreme court of Wisconsin should fix the time for paying that judgment, and that such is the allegation.

On the part of the plaintiff it is pointed out that no absolute time is stated when the payment should be made; that the words "not later" are used. Counsel for plaintiff admit that the supreme court of Wisconsin did not absolutely fix the time for the payment of the then Case judgment, but it directed the circuit court, under certain instructions, to make a restatement of the account between the parties; and in pursuance of such direction it is averred that the circuit court decreed the sum of $200,000 be paid by Fish Bros. & Co. to Case within six months from the entry of the judgment; that it is averred that the six months have expired, and that a reasonable time has elapsed, and neither Stephen S. Lyon nor Isaac L. Lyon has paid the said sum of $25,000, or any part thereof, although the Case judgment has been paid and satisfied.

That, construing the averments together, it is not a reasonable construction of the contract between the parties to hold that it is a condition precedent to the payment of the $25,000 that the supreme court should absolutely fix the time for the payment of the Case judgment; that there is not such necessary connection between the two events that the court should hold that, in case there should be a failure, as counsel for plaintiff admit there has been in this case, in

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the supreme court literally to fix the time, therefore there should be no payment by Lyon for his interest in the business.

That the declaration avers that it was contemplated by the parties at the date the contract was entered into that the supreme court would, among other things, fix and determine the time for the payment of the Case judgment, which was then pending in the supreme court of Wisconsin; that the supreme court, contrary to the expectation of both, reversed the judgment, and sent the case back to the circuit court, which afterwards fixed the time; and counsel insist that, by a proper construction, the time set by the circuit court under the direction of the supreme court should be considered as the time for the payment, or else a reasonable time for the payment would be implied in case of a technical failure of the supreme court to fix the time.

The question presented for our decision is whether the declaration describes the contract and sets forth the undertakings of defendant according to their legal effect. The contract of guaranty signed by defendant on its face shows that it does not embrace the whole agreement between the parties. The contract entered into is set out in the declaration, with its surrounding circumstances, and the situation of the parties with reference to the subject-matter is detailed with minuteness. The defendant can only be called upon to perform his contract according to its legal effect. It is admitted that the parties entered into the contract, and stipulated for the time of performance, with reference to the time which should be fixed by the supreme court of Wisconsin for Fish Bros. & Co. to pay a certain judgment in favor of Case. Instead of fixing a time for the payment of such judgment, the court, without the fault of the defendant, reversed such judgment, and remanded the case to the circuit court for a restatement of the account on the basis laid down in the opinion. The account was restated in the circuit

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court, and a judgment rendered in favor of Case, and a time fixed for its payment.

It appears from the allegations of the declaration that the time of performance agreed upon by the parties has become impossible by reason of the failure of the court to fix a time for the payment of the Case judgment,—a contingency not contemplated by the parties. They contracted upon the basis of the continued existence of the judgment appealed from in some form and to some amount. The condition is implied that, if the performance becomes impossible from the reversal of the judgment, performance should be excused; for the parties have agreed upon no other time of performance, and courts cannot make or supply defects in contracts which the parties themselves have neglected to provide for. 2 Chit. Cont. (11th Amer. ed.) 1076; *Shear v. Wright*, 60 Mich. 159 (26 N. W. Rep. 871).

This case is the same upon principle as the case cited by Mr. Chitty at page 1075, where the purchaser of a house agreed to pay a certain sum in addition to the purchase money, provided the pavement in front of the adjoining houses should be laid down by a specified time. It was held that, inasmuch as the pavement was not laid down by that time, he could not be called upon to pay the money, although the delay was occasioned by the badness of the weather. *Maryon v. Carter*, 4 Car. & P. 295.

The time fixed for performance in this case failed without any fault of the defendant.

It is not competent, by pleading a change of circumstances from those the parties contemplated and engaged with reference to as to time of performance, which always forms an essential element in every contract, to substitute a new condition and different time. The failure to perform within the time alleged is not the failure to perform within the time required by the contract; nor is it the same in legal effect. It is not the same to agree to pay $25,000 not later than the

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time set by the supreme court of Wisconsin for the payment of the Case judgment, that it is to agree to pay $25,000 not later than the time set by the circuit court of Racine county to pay a judgment which should be thereafter rendered in favor of Case. We cannot judicially know that the new time for payment fixed by the pleader will be a benefit or an injury to the defendant. It is enough that it stands admitted that it is not the contract he entered into.

The judgment of the circuit court must be affirmed.

MORSE, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

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WILLIAM E. WARE, PROSECUTING ATTORNEY OF BRANCH COUNTY, v. NOAH P. LOVERIDGE, BRANCH CIRCUIT JUDGE.

Criminal law—Breach of the peace—Use of insulting language in dwelling-house, in presence of occupants—Mandamus.

1. The use of foul, abusive, and insulting language in a dwelling-house, in the presence of the occupants, unaccompanied by threats, and causing no expectation or fear of personal violence, is *not* a breach of the peace within the common-law definition of that term.
2. *Mandamus* will not lie to compel a circuit judge to try an information for an alleged "breach of the peace," charged to have been committed by the use of foul, abusive, and insulting language in a dwelling-house, in the presence of the occupants, but accompanied with no threat, and causing no expectation or fear of personal violence.
3. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—No principle is more universally settled than that which deprives all courts of power to *infer*, from their judicial ideas of policy, crimes not defined by statute or by common-law precedents.

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b—Nothing can be a crime until it has been recognized as such by the law of the land.

c—It is a fixed rule that an act must be left to *civil* remedies, unless it has been recognized as so dangerous to the public as to need repression or punishment as a wrong to the body politic.

d—One of the primary objects of the creation of the offices of conservators and justices of the peace was to prevent breaches of the peace, by putting persons under bonds for keeping the peace, or for their *good behavior*, which includes breaches of the peace, and more.

e—It has always been held, and very wisely, that personal injuries purposely inflicted have a *direct* tendency to disturb the public tranquillity; but there are very few cases where what is essentially a private, and not a public, grievance has been adopted into the list of crimes.

4. Mr. Justice LONG, in a *concurring* opinion, concurred in by CHAMPLIN and MORSE, JJ., says: "It is true that indictments will not lie for private wrongs not directly affecting the public: but, where the conduct and language of the individual is such that its natural and necessary tendency is to incite others to open violence, and provoke assaults, such conduct and language *ought* to constitute a public offense," for which some mode of punishment should be provided by the Legislature.

5. Chief Justice SHERWOOD, in a *dissenting* opinion, says: "I can never consent to the doctrine that the public peace, which the law secures to the citizen of this State, does not include and secure the tranquillity of the home against invasion by the lawless and violent; and it should be held that, among the most important duties courts and conservators of the peace have to perform is to be vigilant in protecting the quiet and sanctity of the home."

Application for *mandamus* to compel respondent to try an information for an alleged breach of the peace. Submitted April 16, 1889. Denied June 28, 1889. The facts are stated in the opinion.

William E. Ware, in *pro. per.*, for relator.

H. C. Loveridge (*John B. Shipman*, of counsel), for respondent.

CAMPBELL, J. Relator applies for a *mandamus* to compel respondent to assume jurisdiction over and try an information for what is claimed to have been a breach of the peace. Such an application for the exercise of our extraordinary

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jurisdiction in a case of private trespass, for which a civil action would lie, is unprecedented, as I believe, in jurisprudence.

The only instance in which we have ever before been called on for a *mandamus* was in a series of cases of felony affecting the public interests directly, where indictments had been found in the Wayne circuit court, and certified to the recorder's court of Detroit for trial, and the latter court, on doubts of jurisdiction, refused to try them. The cases involved constitutional questions, and the calling of a grand jury had been resorted to in order to reach parties who would not have been prosecuted without it.[1] The circumstances were urgent and peculiar; and, while I am not prepared to say we cannot use our discretionary powers in petty misdemeanors, I do not think the interference would be desirable, or that the public interest would be subserved in compelling a circuit judge to do what we could not require of a prosecuting attorney.

But as the questions have been presented and argued, and the relator's zeal has induced him to regard the matter as one of practical moment, there will be no harm done by considering it.

The facts set out show, if true, that one William Foster, while drunk, entered the house of one William Goodwin, and in presence of said Goodwin, his wife, Mary Goodwin, and his son, Clarence Goodwin, used some obscene language concerning his own wife, who was not present, and another person, not described, whom he referred to as Anna, and used some other abusive and improper language, partly not specified.

There is nothing in the affidavit on which Foster was held to examination indicating that he threatened, or that Goodwin expected or feared, personal violence. As described, the

[1] See *People v. Judge of the Recorder's Court of Detroit*, 59 Mich. 529.

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performance was the vaporing of a filthy-minded person whose tongue was loosed by drinking, and who was certainly an unsavory and undesirable visitor, but nothing legally worse.

The only ground on which relator has endeavored to base a claim of breach of the peace is that this language was calculated to provoke violence; and it is on the ground that this case does not happen to come within the penalties of any of our statutes that it is claimed to be punished as a common-law misdemeanor, and therefore beyond the jurisdiction of a justice of the peace, and punishable by a heavy fine and an imprisonment at least quadruple of that which a justice could impose, and more than fourfold heavier than any court of record could impose for similar offenses committed in public and not in private, and directly and unavoidably violating the public peace.

No principle is more universally settled than that which deprives all courts of power to infer, from their judicial ideas of policy, crimes not defined by statute or by common-law precedents. Nothing can be a crime until it has been recognized as such by the law of the land. It is a fixed rule that an act must be left to civil remedies, unless it has been recognized as so dangerous to the public as to need repression or punishment as a wrong to the body politic. Our statutes which contain the saving clause covering offenses which may have been accidently overlooked in framing them, confine it to offenses punishable at common law. How. Stat. § 9434. This must necessarily mean the common law as previously recognized and defined by the only source of the common criminal law,—in the course of judicial precedents,—in the light of which all of our statutes themselves are construed.[1] It is a significant fact that very few, and it may perhaps be said that none, of the recognized books of author-

[1] See *In re Lamphere*, 61 Mich. 106 (head-note 2).

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ity on the criminal law contain any such title as "Breach of the Peace," with a definition of it. The books almost universally divide crimes into classes; and breaches of the peace, so far as they are found defined at all, are found either as offenses against the lives and persons of individuals, or as public disturbances, except where for certain reasons they are made felonies. But there is a class referred to in the decisions and commentaries which seems to fix the nature of the offense which may be so classed beyond doubt.

One of the primary objects of the creation of the offices of conservators and justices of the peace was to prevent breaches of the peace, by putting persons under bonds for keeping the peace, or for their good behavior, which includes breaches of the peace, and more. The breach of the peace threatened was the occasion for requiring such security. Any breach of the peace committed afterwards forfeited the recognizances. The rulings under these heads give us the most reliable information of what was meant by the term "breach of the peace." The present case is very plainly excluded by all the reliable authorities from that category.

The only cases of breach of the peace, not involving open disturbance in public places, and to the actual annoyance of the public at large, or persons employed and actually engaged in public functions, require personal violence, either actually inflicted or immediately threatened. There are, in some of the definitions, references to language tending to provoke a breach of the peace, and relator's claim is based on this. But the authorities have very plainly held that this covers nothing that is not meant and adapted to bring about violence directly. It is laid down, very positively, that insulting and abusive language does not come within the rule, but it must be threats of immediate violence, or challenges to fight, or incitements to immediate personal violence or mischief. It has always been recognized that, in a certain sense, slander is actionable chiefly for the reason that it has a provoking ten-

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dency; but slander, no matter how offensive, is not indictable, and it is not recognized as ground for requiring security to keep the peace. No words whatever, from their offensiveness and inciting tendency, are held to be breaches of the peace, with or without other circumstances not involving personal violence.

Hawkins, in chapters 60 to 63 of his Pleas of the Crown, goes very fully into the subject, and points out the distinction always recognized by the authorities between words which, however abusive and offensive, may excite anger and those which directly incite to and invite violence; and, even when used in public, it is shown that they do not constitute an affray, which requires physical violence; and this is, as shown, the essential element of a breach of the peace committed, attempted, or directly and immediately threatened. The same distinction is recognized by Mr. Bishop in section 560, vol. 1, Crim. Law, where he refers to *Com. v. Edwards*, 1 Ashm. 46, a case directly in point. The same question is treated at some length, with illustration, in 4 Co. Inst. 180, 181, where the liability under a recognizance to keep the peace is discussed. It is also clearly dealt with in Wood's Institutes, p. 423. The question of what is meant by tending to provoke violence, which seems to have been regarded as a somewhat unfortunate ambiguity, has been so frequently and so uniformly disposed of as to leave no doubt on the law. The word originally had a much narrower meaning than it afterwards received in popular use.

There are many references, more or less explicit, which bear in the same direction, partly by enumeration, and partly by other equally satisfactory reasons. It has been held on this principle that opprobrious words will not justify an assault, while it is equally familiar doctrine that a breach of the peace will do so. Arrests for breaches of the peace, without process, have always been put upon the necessity of preventing violence. In the old digests and similar com-

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pends, as well as in the standard commentaries, it is laid down that an indictment will not lie for private wrongs not directly affecting the public; and under the head of "Indictment," in Bacon and Comyn, as well as in the other digests, the lists of cases indictable and not indictable follow the rule referred to. In referring to the jurisdiction of the "Leet," Comyn says it is to inquire of all assaults, affrays, or blood spilt, or any open breach of the peace. Under the head of "Imprisonment," the right to arrest without a warrant is denied for insults and contemptuous words, even against a magistrate not exercising his office; although in some cases, when this abuse is committed in public, and leading to riotous demonstrations and tumult, it may be different. On the same principle, disturbances of public worship, or of other public assemblies, have been recognized as breaches of the peace, on account of the more dangerous character of tumultuous acts over those not done in public. And, under the head of "Justices of the Peace," the doctrine as to requiring security, as well as what will forfeit it, is applied in favor of complainants, when a person has just cause to fear that another will burn his house, or do him a corporal hurt, or procure others to do him such, or threat to imprison, but not because at variance, or that harm will be done of another kind. So it is said the security is not to be forfeited for abusive language, or similar grievances, because they do not tend directly to the breach of the peace, nor for trespasses not to the person.

It had always been held, and very wisely, that personal injuries purposely inflicted have a direct tendency to disturb the public tranquillity; but there are very few cases where what is essentially a private, and not a public, grievance has been adopted into the list of crimes. Trespasses are generally left to redress by private remedies; and, until the legislative authority discovers that particular wrongs require more stringent treatment, it is wise to so leave them. Public pol-

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icy has never favored the needless multiplication of crimes, and partly because the public ought not to be saddled with the expense, and the public peace ought not to be scandalized by the use of public agencies to gratify private spite.

If our statutes had been so framed as to encourage the multiplication of petty prosecutions, there might be more plausibility in the desire to put great and small misdeeds on the same plane. But our laws have indicated a more sensible spirit. If foul and abusive language should be punished anywhere, it should be where it actually disturbs the public. But, in the few instances specifically provided for, these disturbances are very lightly dealt with. Disturbance of public worship is punishable by a penalty of not more than $50, or imprisonment not more than 30 days. How. Stat. § 9295. Disturbances of election and public meetings are punishable by fine of no more than $20, or imprisonment not more than 10 days. How. Stat. § 9296. No court of justice can fine for contempt committed in its presence, no matter how aggravated, by fine of more than $250, and imprisonment not more than 30 days. How. Stat. § 7235. A justice can punish an assault much more severely than the disturbances specified. It is preposterous to suppose that abuse in private can be as dangerous or offensive to the public as the same would be in public; and it would be singular if there should be a possibility, under our statutes, of finding an omitted case involving such consequences. The common-law authorities do not justify it; and the proverb that "hard words break no bones" is as well maintained in the theory of jurisprudence as in the popular sentiment.

In addition to the previous references, which are justified by the adjudications, the following citations are applicable: *Ex parte Marlborough*, 5 Q B. 955; *Ex parte Chapman*, 4 Adol. & E. 773; *Reg. v. Storr*, 3 Burrows, 1699; *Reg. v. Atkins*, Id. 1706; *Reg. v. Dunn*, 12 Adol. & E. 599; *Reg. v. Mallinson*, 16 Q. B. 367; *Ex parte Hulse*, 7 Law & Eq.

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414; *Lord Vane's Case*, 2 Strange, 1202, 13 East, 171, note; Com. Dig. "Justices of Peace" (B. 8); 4 Co. Inst. 181; Wood, Inst. 423; 1 Russ. Crimes, 750; Toml. Law. Dict. "Justices of the Peace"; 2 Hawk. P. C. 26; 4 Bl. Comm. 215, 216.

The *mandamus* should be denied.

CHAMPLIN, J., concurred with CAMPBELL, J.

LONG, J. I concur in the result reached by my Brother CAMPBELL in this case, but I am not prepared to say that insulting and abusive language used towards one in the presence of his family may not come within the definition of a breach of the peace at the common law.

It is true that indictments will not lie for private wrongs not directly affecting the public; but, where the conduct and language of the individual is such that its natural and necessary tendency is to incite others to open violence, and provoke assaults, such conduct and language ought to constitute a public offense. In Desty's American Criminal Law, § 91, the rule is laid down that every person who, without authority of law, disturbes the peace and security of the public, or who commits any act which tends to provoke or excite others to a breach of the peace, is guilty of a misdemeanor; and all acts tending to disturb the public peace are indictable at the common law.

It is not necessary that the peace be actually broken to lay the foundation to such a proceeding. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Our statute does not define the offense, but provides a punishment upon conviction of the offense, as it is recognized at the common law as a misdemeanor; and none of the writers upon the common law treat the subject under a distinctive title as "Breach of the Peace."

It is provided by our statute that—

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"Every person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this State, shall be punished by imprisonment in the county jail not more than two years, or by fine not exceeding two thousand dollars, or by both, in the discretion of the court." How. Stat. § 9434.

A conviction of a breach of the peace would be punishable under this statute.

It will be seen that the punishment prescribed is much more severe than assaults and batteries, and other like offenses. In some of the states the legislature has defined, by statute, what acts shall constitute the offense, and has prescribed the punishment therefor.

Some mode of punishment, as for a public offense, should be provided and prescribed by the Legislature for this class of cases, though the offense does not fall within the common-law definition of a breach of the peace.

That one may enter the dwelling of another, and there, in the presence of his family, use abusive and insulting language, and the party be left to his remedy in a private action only, would seem to require of the Legislature some means of redress for such abuse and insults more speedy than is to be had in an action for trespass or slander.

The party injured may indeed expel the offender, and eject him from the premises, using such force, and only such, as may be required to do so, and may have a private action; but this does not often meet the requirements of such cases.

The home of every person is held sacred. There one may retire, and, under the law, be protected in its quiet and peaceable enjoyment. It is his castle, into which no other may offensively intrude; and yet we find, as in this case, a stranger entering there, drunk and boisterous, calling the wife of the householder "a damnation liar," and using other vile and obscene language, and are compelled, under precedents too well settled to be overturned, to turn the aggrieved

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party over to his civil remedy under the law. Such outrageous conduct should subject the party to punishment as for a public offense; but it is a matter of legislative concern, and not for the courts.

Courts cannot extend by construction these long-settled rules to meet the exigencies of some particular case.

CHAMPLIN and MORSE, JJ., concurred with LONG, J.

SHERWOOD, C. J. (*dissenting*). I must entirely dissent in this case from the conclusion reached by my brethren in their opinions filed, and from the reasoning by which they justify it.

I can never consent to the doctrine that the public peace, which the law secures to the citizen of this State, does not include and secure the tranquillity of the home against invasion by the lawless and violent; and it should be held that, among the most important duties courts and conservators of the peace have to perform, is to be vigilant in protecting the quiet and sanctity of the home; and, when the administration of the law fails to do this, it ceases to become useful in any community; and, where its means to furnish such protection are limited to a civil action against the marauder and desperado, it fails, not only to accomplish the object intended, but is unworthy of the respect of all classes of our people.

It is substantially conceded that, if the violator of the rights of the injured family in this case had committed the same offense upon the public streets, he would have been guilty of a great outrage of the public peace. I think it must be regarded as a strange doctrine indeed that such action should be held less atrocious because committed by entering the home of this family, two rods distant, where the consequences were of a far more serious character.

I think the action taken by the prosecuting attorney was right; that he should be commended for his vigilance; and the *mandamus* should be granted.

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MARY DUNDAS v. THE CITY OF LANSING.

Municipal corporations—Injury from defective sidewalk—Statements of party as to cause of injury—Notice to city—Contributory negligence—Evidence.

1. Statements by a party as to the *manner* of his injury, not necessary to diagnose his case, cannot be given in evidence by an attending physician, any more than by a non-professional man.[1] *Merkle v. Township of Bennington*, 58 Mich. 160.

2. The *individual* knowledge of officers or agents of a municipal corporation, who in such capacity have powers or duties conferred upon them with reference to a given matter, is the knowledge of the corporation, and notice to them is notice to the corporation, which is bound by such knowledge or notice.

3. Where the liability of a municipal corporation is statutory, it must depend upon a true interpretation of the statute creating it.

4. A municipal corporation is only chargeable with notice or knowledge of the *particular* defect in a street or sidewalk causing the injury complained of.

5. A city cannot be held liable for damages caused by the non-repair of a cross-walk on a particular street by showing that sidewalks in the vicinity were out of repair. *G. R. & I. R. R. Co. v. Huntley*, 38 Mich. 540.

6. Where, in a negligence case, the defect causing the injury complained of is in the walk itself, prepared and provided for the use of pedestrians, and the accident happened in the night-time, and while pursuing the ordinary traveled way, the question of the plaintiff's care should be submitted to the jury as a question of fact.

7. It is not competent for counsel for plaintiff to show that plaintiff's memory has become impaired since meeting with the injury sued for, for the purpose of counteracting the damaging effect of his testimony, and forming a basis for an argument to the jury that he is mistaken in the same.

Error to Ingham. (Pack, J.) Argued April 23, 1889. Decided June 28, 1889.

[1] See *Lendberg v. Brotherton Iron Mining Co.*, *ante*, 84 (head-note 1).

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Case for injuries received by reason of a defective cross-walk. Defendant brings error. Reversed. The facts are stated in the opinion.

R. A. Montgomery, city attorney, for appellant.

Cahill & Ostrander, for plaintiff.

CHAMPLIN, J. This action was brought to recover damages for a personal injury alleged to have been caused by the neglect of defendant in not keeping a cross-walk in repair. An objection is raised by the defendant which goes to the plaintiff's *right* of action, although not affecting her *cause* of action, which, if disposed of in favor of the defendant, will suspend further proceedings in this suit, and render it unnecessary to pass upon other questions raised by the record.

The charter of the city of Lansing contains the following provision:

"The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with an affidavit of the person rendering it, which affidavit may be taken and certified by any member of the common council, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; that the sums charged therefor are reasonable and just; and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each.

"It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city, that it has never been presented, verified as aforesaid, to the council for allowance, or that the claim was presented without the affidavit aforesaid, and rejected for that reason, or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it." Section 17, tit. 4, Act No. 282, Local Acts of 1875.

The amendments of 1883 do not affect the point under consideration. See Local Acts of 1883, p. 734.

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The record shows that on the sixteenth day of January, 1888, the plaintiff presented her claim to the common council in detail, in which she explained when, where, and how the accident happened, her consequent injury, her expenses incurred for medical attendance, medicine, and loss of time resulting from such injury. She stated that she had suffered greatly in body and mind by reason of her injuries; that she was unable to state any amount which would be adequate for the pain and suffering she had endured, and must continue to endure, nor her loss in case disability should prove to be permanent; but if her claim should be recognized by the city in the spirit of fairness, and an adjustment thereof speedily made, she would accept the sum of $2,000, in addition to the other items, which amounted to $81. She asked that her claim be investigated by the council, and a reasonable and just allowance made her as compensation. Her claim was verified by her affidavit, in which she stated that no set-off exists to her claim, nor has any payment been made on account thereof.

The claim was referred to the city attorney, who reported it back, with the recommendation that the same be laid upon the table, which report and recommendation was adopted by the unanimous vote of the council.

No investigation was made by the council into the facts and circumstances or merits of the claim, and on April 23, 1888, this suit was commenced to recover her damages for the same claim so presented to the council.

We think the plaintiff complied substantially with the requirements of the charter. Ample time and opportunity were afforded the council to investigate the merits of the claim presented, had they chosen to do so. The plaintiff is not barred from a recovery by the charter provisions mentioned.[1]

[1] See *Lay v. City of Adrian*, *ante*, 4 8 (head-note 8), holding that such a charter provision does not apply to a claim for personal injuries sustained by reason of the negligence of the city.

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The plaintiff claims that on Thanksgiving day, 1887, as she was traveling from her place of employment to her home, at about seven o'clock in the evening, accompanied by two of her children, she stepped in a hole in the cross-walk as she was crossing Butler street, and partly fell, and received a severe strain in her back, which occasioned an injury to her spine, and from the effects of such injury she has suffered great bodily pain, and become disabled from doing work; that she was in the exercise of ordinary care; and that the city was negligent in not keeping the cross-walk in repair after it had notice or knowledge of its unsafe condition. The hole was caused by a broken plank in the cross-walk directly over the gutter. The plank was from six to eight inches wide, and had broken about eighteen inches from the west stringer, and that length had been torn out and removed; thus making the hole about eight by eighteen inches, and about eighteen inches deep to the bottom of the gutter.

On the fourth day after the accident plaintiff sent a request to her employer, a Mr. Wilson, to send her some liniment. Instead of doing so, he sent her a physician, Dr. Ostrander, who testified to making an examination of the injuries of plaintiff three or four days after Thanksgiving day. He testified fully as to her condition and to her complaints as to her ailments, and, against the objections of the counsel for defendant, he was permitted further to testify as follows:

"She told me that she stepped in the hole at the cross-walk, and that she fell quite a distance. I think she said she stepped in with the right foot,—but I am not certain about that,—and that she received a severe shock, severe wrench to her back, in falling that distance, and tried to save herself, and that she came on home, and suffered a great deal that night,—a great deal of pain."

The court erred in permitting the declarations of the plaintiff, as to the manner and circumstances of her injury, to be given in evidence. There is no pretence that they were a part of the *res gestæ*. They were not necessary to enable the

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physician to correctly diagnose her case. He had testified fully to that already. The only purpose which such testimony could answer would be to establish the fact, which was disputed, that she had received the injury complained of on account of a defect in the cross-walk. This is made more manifest by the question by which such testimony was followed, namely:

"What did you think at that time as to whether the symptoms that you found there could be accounted for by such an injury as she described? Can you tell the jury directly whether or not such an injury as she complained of could have been caused in the manner that she described to you at that time?"

Objection was timely made to this question, and was overruled. The witness answered:

"Well, it could have been caused by the accident that occurred."

That narrations of past occurrences as to the manner in which a party has been injured cannot be given in evidence by an attending physician, any more than by a non-professional man, is settled in this Court by the case of *Merkle v. Township of Bennington*, 58 Mich. 160 (24 N. W. Rep. 776). The testimony should have been excluded.

The questions put to Dr. Shank, calling for a narration from the plaintiff of the way the injury occurred, should have been excluded for the same reason.

The statute creating the liability of municipal corporations, and giving a right of action for negligence to a party injured, contains this proviso:

"That in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity, after knowledge by or notice to such township, village, or city that such highways, streets, bridges, sidewalks, cross-walk, or culvert have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice." Laws of 1887, Act No. 264, § 2.

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The plaintiff, in order to prove notice to the city, introduced testimony to show that actual notice was given to the alderman of the ward in which the cross-walk in question was located of the defective condition of sidewalks in the vicinity of the defective cross-walk which occasioned the injury as claimed. This notice was given in the latter part of April or the forepart of May, 1887, and the accident occurred in November. There was testimony introduced tending to show that the particular defect complained of had existed six months prior to the accident to plaintiff.

The individual knowledge of officers or agents of a municipal corporation, who in such capacity have powers or duties conferred upon them with reference to a given matter, is the knowledge of the corporation, and notice to such officers or agents is notice to the corporation, and the corporation is bound or affected by such knowledge or notice.

Where the liability of the municipality is created by statute, such liability must depend upon a true interpretation of the statute under which it is created. The charter of the city of Lansing provides that—

"The common council shall be commissioners of highways for said city, and shall have the care and supervision of the highways, sidewalks, streets, bridges, * * * therein, not belonging to or occupied by the State; and it shall be their duty to give directions for the repairing, preserving, improving, cleansing, and securing of such highways, * * * and to cause the same to be repaired, cleansed, improved, and secured from time to time, as may be necessary; * * * to divide said city from time to time into so many highway districts as they shall deem expedient, by an ordinance or resolution entered in their minutes; to appoint and assign to each of such districts so many inspectors of streets as they shall from time to time deem proper." Local Acts of 1875, tit. 12, § 14, Act No. 282.

"It shall be the duty of the street inspectors of the several ward districts to perform, or cause to be performed, all such labor, repairs, and improvements upon the highways, streets, sidewalks, * * * within the city, as the council or

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city marshal shall direct to be done by or under their supervision." Title 5, § 25.

Section 21 of the same title provides that—

"It shall be the duty of the marshal to superintend, under the general direction of the common council, all work to be done or performed, ordered, or required to be done or performed upon or in relation to any of the public streets, walks, * * * of said city."

The city is divided into six wards, and two aldermen are elected in each ward. The mayor and aldermen of said city constitute the common council. The city attorney, city marshal, city auditor, street commissioners, city surveyor, and engineer of the fire department have seats in the council, with the right to take part in all its proceedings and deliberations on all subjects relating to their respective departments, but without the right to vote, and may be compelled to attend the meetings of the council the same as members. Act No. 338, Local Acts of 1883, tit. 4, § 10.

Under these provisions of the charter, the primary control over the streets, and the authority to direct repairs, are vested in the common council. The city marshal is superintendent of all work done, or ordered by the common council, in relation to the public streets, and the street inspectors are to do or cause to be done all repairs upon the streets which the council or city marshal shall direct to be done by or under their supervision. The clause of the charter authorizing street "commissioners" to have a seat in the common council evidently refers to street "inspectors," as the council are given authority to appoint "street inspectors," but I find no such officer as "street commissioner" who is either elected or appointed by the terms of the charter.

As the corporation can acquire no knowledge of defective streets and sidewalks except such knowledge as is possessed by the aldermen of the city, or the city marshal or the street inspectors, who are the only agents having any duty to per-

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form with reference to keeping streets in repair, it would seem to follow that knowledge of any such agents of a defect in streets or sidewalks would be the knowledge of the corporation, and that actual notice given to either of these agents of such defects would be notice to the corporation.

Now, while an individual alderman, not acting in a meeting of the council, has no control or supervision over the streets any more than a private citizen, yet when he meets in council he does have a voice in saying what repairs shall be made, and, if a meeting of the council has been held after knowledge by or notice to him, there is no good reason why such knowledge or notice should not be imputed to the body of which he is a member, based upon the duty which he owes to the public to impart his knowledge affecting the public interest to the council.

For the same reason should the knowledge of the city marshal and street inspectors be held to be the knowledge of the council. They are entitled to seats in the body, and to be heard upon the matters under their supervision, and the keeping of streets in repair comes under their supervision.

Had each alderman of the city seen this hole in the walk, and been cognizant that it had been there for six months, it would be absurd to hold that the collective body called the common council had no knowledge of what each individual composing it knew full well. The duty of all to bring the matter of repair before the council for its action is no greater than the duty of each member to do so who is possessed of such knowledge. The aldermen represent the city in respect to those matters placed under the control of the council, and are so far its agents that notice to them with regard to such matters is notice to the principal. *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 127; *North River Bank v. Aymar*, 3 Hill, 262; *U. S. Bank v. Davis*, 2 Id. 451; *Security Bank v. Cushman*, 121 Mass. 490; *Trapnell v. City of Red Oak*

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Junction, 39 N. W. Rep. 884; *Carter v. Town of Monticello*, 68 Iowa, 178 (26 N. W. Rep. 129).

It must be borne in mind, however, that the knowledge or notice which the statute requires is that of the *particular* defect complained of, and not knowledge or notice of other defects, which, although they are shown to exist to the knowledge of the city, did not occasion the injury alleged.

The longest time the testimony of any of the witnesses in this case showed the defect in the cross-walk to have existed was six months, and the notice to the alderman was prior to that time; and the notice to the city marshal was something like two years prior to the accident. The notice given was as to the defective condition of the sidewalks generally, and not of any particular defect. Such testimony ought not to have been received. It had no tendency to show actual notice of the defect complained of, and it was too remote and indefinite for the purpose of proving that the particular defect had existed such a length of time that notice might be presumed or inferred. The city cannot be held liable for damages caused by the non-repair of the cross-walk at Butler street by showing that sidewalks in the vicinity were out of repair. In *G. R. & I. R. R. Co. v. Huntley*, 38 Mich. 540, CAMPBELL, C. J., said:

"We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time as well as place of the accident."

To the same effect are *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Robinson v. Fitchburg & Worcester R. R. Co.*, 7 Gray, 92; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Bailey v. Township of Trumbull*, 31 Conn. 581; *Jacques v. Bridgeport Horse R. R. Co.*, 41 Id. 61.

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In this case the plaintiff was permitted to produce testimony tending to show generally the bad and defective condition of the sidewalks a block or more each way from the cross-walk on Butler street. This was error. It is going far enough to hold that it may be shown that accidents have happened to other people who were exercising ordinary care, on account of the particular defect complained of; but such testimony is admissible mainly as tending to show the dangerous character of the defect,—in other words, that on account thereof the street or sidewalk or cross-walk was not reasonably safe and fit for travel. Very remotely, and in connection with other testimony showing the length of time the defect had existed, it might have a bearing upon the question of notice to the municipality. *Smith v. Township of Sherwood*, 62 Mich. 159 (28 N. W. Rep. 806); *Tomlinson v. Derby*, 43 Conn. 562.

There was abundance of testimony tending to show that the defect in the cross-walk at Butler street was in plain sight, and obvious to any person passing along the street, and that it had existed such a length of time as justified the jury in finding that the city had notice of the defective and dangerous condition of the cross-walk.

The question in the case that most perplexes us is the contributory negligence of the plaintiff. She testified as a witness in her own behalf, and, so far as any impression can be derived from the record, she gave her testimony intelligently and truthfully. There is no indication from her answers of any impairment of intellect or of memory. She says that she was on her way home from her daily labor, walking in company with two of her children,—one a daughter of the age of eighteen, and the other a son of the age of seven; that the time was from seven to eight in the evening; that the weather was stormy, either a slight mist or snow falling; that she had traveled over the same walk for several weeks, twice a day, for three, four, and five days in a week, and had known

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of the broken plank and hole in the cross-walk at the Butler-street crossing from June to the time of the accident; that one of her children was upon one side of her, and the other upon the other side of her, and, as she was crossing Butler street, she stepped into the hole in the cross-walk, and partially fell, and was caught by her eldest daughter, so that she did not fall down; that she passed right on home, but the result of stepping into the hole was to severely wrench her back, causing, as the testimony tends to show, injuries of lasting and serious character.

She testified that she was in a hurry to get home, and was not thinking about the hole in the walk, nor looking for it, and that if she had been thinking about it, or looking for it, she would not have stepped into it; that she was sure it was because she did not think of it that she stepped in; that she did not look for the hole. She also testified that she could not recollect what she was thinking about or looking at when she stepped in.

Counsel for defendant claims that it conclusively appears from her own testimony that she was not in the exercise of ordinary care, and that a verdict should have been directed for the defendant on the ground that her own negligence contributed to the injury.

The question of contributory negligence when a person is injured through a defect in the street or walk of which he had previous knowledge is one of some difficulty. Such knowledge does not always bar a party from a right of recovery, as we held in *Lowell v. Township of Watertown*, 58 Mich. 568 (25 N. W. Rep. 517).

There are many cases reported where under the circumstances attending the transaction courts have rightly held that the party was not entitled to a recovery where the danger was apparent and known, and the injury resulted from their own carelessness and inattention.

Where the defect is in the walk itself, prepared and provided

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for the use of pedestrians, and the accident happened in the night-time, and while pursuing the ordinary traveled way, the question of the plaintiff's care should be submitted to the jury as a question of fact.

It is doubtless true, as plaintiff testified, that had she been at the time upon the lookout for this hole in the walk she might have seen and avoided it; but the question is, was she negligent, under all the circumstances and surroundings, in not seeing and avoiding it? The darkness of the night, the storm, her anxiety to get home, are all circumstances that should be weighed as bearing upon her conduct upon that occasion. The question is not free from doubt, and when it is not it should be submitted to the jury.

The plaintiff's counsel endeavored to explain away the frank avowal of the plaintiff in her testimony,—

1. By showing that she had cautioned her children to be careful, and spoke about the walk being bad.
2. By introducing testimony to show that plaintiff's memory had become weakened, and thus to form the basis for argument to the jury that she was mistaken in her testimony, and that she did have the danger in her mind, and was in the exercise of care with reference to this particular defect, but had forgotten it.

He was permitted to show by her son-in-law and other witnesses that after she had testified she could not tell or remember what she had testified to upon the trial. This testimony was improperly admitted. The following is a sample:

"*Q.* State to the jury how her health has been since she was here on Fr day.

"*A.* In an hour's time after she got home—after I went home Friday night—she could not tell what she swore to on the stand.

"*Q.* How did her physical health appear to be as to whether she was able to sit up? Describe to the jury how she appeared physically.

"*A.* She went to bed as soon as she got home, and didn't get up again until the next morning. We took her supper

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to her. She did not eat but a very little, and she has not been out of her bed but once since.

"*Q.* What did you say to her in relation to what took place here in court?

"*A.* I asked her if she remembered what she said when they asked her whether it was snowing or not. Said she didn't know, could not remember,—did not know as they asked her that question at all. That was about all that we talked about."

This testimony could not have other than a pernicious effect upon the jury, and was inadmissible for any purpose. Consequently the charge of the court, based upon this testimony, was likewise erroneous.

The judgment must be reversed, and a new trial granted.

CAMPBELL and LONG, JJ., concurred.

MORSE, J. While I agree with Mr. Justice CHAMPLIN that there was evidence wrongfully admitted as to the general condition of the sidewalks away from and too remote from the place of the accident, I cannot agree with all that he has said upon that subject.

It was not necessary that the attention of the officers of the city should have been called directly to this hole in the crosswalk on Butler street, into which the plaintiff stepped. Any notice which would naturally call their attention to it would be sufficient; and I think when such officers were notified that the walks were defective for a block each way from the Butler-street crossing, such notice, if acted upon by them, would have also brought to their notice this particular defect in the crossing. Therefore the evidence of such notice had a tendency to prove notice of such particular defect.

It can never be necessary that specific notice of the particular hole or defective spot shall be brought home to the city, if its officers had notice that the walks in its immediate locality were generally defective and out of repair.

I concur in the remainder of the opinion.

SHERWOOD, C. J., did not sit.

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THE PEOPLE v. WILLIAM GALLAGHER.

Criminal law—Accomplice—Privileged communications—Impeachment — Robbery — Criminating question — Admissions of respondent—Constitutional law—Authority of Wayne circuit judge to preside in recorder's court.

1. An accomplice who turns *state's evidence* must make a full disclosure, and statements made to his attorney are not privileged, but cannot be admitted in evidence to impeach him unless his attention is called to them when on the stand.
2. A person charged with a crime can be convicted, in this State, upon the uncorroborated evidence of an accomplice.
3. If *one* of *several* respondents *jointly* engaged in a robbery was armed with a dangerous weapon, *all* may be convicted of the statutory offense.
4. Where a witness testifies fully on his direct examination, and refuses to answer a fair question on cross-examination not in any way directed against his character, or put for the purpose of impeachment, or to affect his credibility because of any wrong or criminal act on his part, on the ground that such answer may criminate him, it is not error for the court to *refuse* to instruct the jury that such refusal must not be considered as in any way discrediting his testimony, nor to charge them that they could give it such credit as they think it deserves.
5. The admissions of a respondent may be shown by his testimony given on the trial of a co-respondent for the same offense.
6. The right to show the contradictory statements of a respondent, in reference to any material fact affecting his guilt or innocence, is not affected by his *not* being sworn as a witness in his own behalf on the trial.
7. Act No. 456, Local Acts of 1887, authorizing either of the judges of the circuit court for Wayne county to act as judge of the recorder's court of the city of Detroit, on request of the recorder, etc., is constitutional, as far as it affects cases of which the circuit court had *original* jurisdiction before the passage of the act.
8. A simple request by the recorder is all that is necessary to give a judge of the Wayne circuit court authority to act as judge of the recorder's court of the city of Detroit under the statute, and

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in the absence of a contrary showing the right of a judge so *assuming* to act will be presumed. *Landon v. Comet*, 62 Mich. 92.

Error to the recorder's court of the city of Detroit. (Gartner, J., presiding.) Argued April 23, 1889. Decided June 28, 1889.

Information for robbery, being armed with a dangerous weapon. Respondent was convicted, and sentenced to 25 years' imprisonment in the State prison at Jackson. Judgment affirmed. The facts are stated in the opinion.

Sylvester Larned and *D. Augustus Straker*, for respondent.

George F. Robison, prosecuting attorney, for the People.

MORSE, J. On the evening of January 3, 1887, Capt. Ira F. Holt, an old and esteemed citizen of Detroit, nearly 60 years of age, was, on his way home and in the residence portion of the city, attacked by four men, violently beaten, and robbed of a gold watch.

The respondent was arrested, with others, for the crime. He was informed against for robbery, being armed with a dangerous weapon, convicted, and sentenced to 25 years' imprisonment in the State prison at Jackson.

He was convicted chiefly upon the testimony of Joseph Coveyeau, an accomplice, although there was some circumstantial evidence looking towards his guilt.

Errors are alleged as having occurred on the trial, and he asks a review of the same in this Court, claiming that he is entitled to a new trial by reason of such errors.

Charles Flowers, an attorney, was examined as a witness on behalf of the defendant. Coveyeau had been, prior to the trial of respondent, tried and convicted for a burglary, committed on the same night as the assault upon Holt, and claimed by the prosecution to have been committed by the

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identical four persons who robbed Capt. Holt, towit, Coveyeau, Gallagher, Preston, and Hartnett.

Flowers defended Coveyeau in the burglary case, and it was sought by the defense to contradict the testimony of Coveyeau, given upon the trial of respondent, by showing that in his statements to Flowers, while he was his attorney in the burglary suit, he named his accomplices in the robbery of Capt. Holt, and did not mention either Gallagher or Preston as being concerned therein, and by other statements exonerated the respondent from any part therein.

Mr. Flowers refused to answer some of the questions upon the ground of privilege, and the circuit judge ruled that he could use his own discretion as to answering them.

Upon the theory of the prosecution, and according to the testimony of Coveyeau, the men who assaulted and robbed Capt. Holt went almost immediately from the place of the robbery to the Moross house, where the burglary was committed, and each was the work of the same four men. Consequently on both trials the two transactions were necessarily more or less connected and involved in the evidence. There can be no doubt, from all the circumstances shown by this record, but that Coveyeau was a participant in both crimes. He was arrested watching in front of the Moross house, while the burglary was going on, and before his seizure was seen to throw away a watch, which was found, and proved to belong to Capt. Holt. One of the officers who came upon the burglars while they were in the house, and fired at them as they ran out, identified Gallagher as being one of them.

These statements of Coveyeau, therefore, made to his attorney while on trial for the burglary, as to who, with himself, committed the robbery, were upon a subject legitimately and necessarily connected with and relating to his defense in that suit.

The question arises, can these statements, made under

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such circumstances, be used upon another trial to show that Coveyeau is testifying falsely or guilty of perjury therein?

The counsel for the respondent contend—

1. That the privilege of declining to answer is not the privilege of the attorney, but of the client; and that Coveyeau, having turned state's evidence, and attempted to convict others by proof also convicting himself, must be deemed to have thereby waived all privileges which would permit him to withhold anything, and therefore Mr. Flowers should have been compelled by the court to give in evidence such parts of the communication of respondent to him, while he was his attorney, as the defense desired, or the whole of it, if demanded by either side.

2. The statements of Coveyeau to Flowers, as to who with himself committed the robbery, could, under no circumstances, be considered privileged, as the privilege exists for lawful purposes only.

Coveyeau, when on the stand, testified that he had a conversation with Mr. Flowers in the jail. This was in answer to a question put to him by the defense on cross-examination.

The question was raised by the prosecution that the conversation was privileged, and the court said that he must answer, but, if they put Mr. Flowers on the stand to rebut the answers, then the question of privilege might be argued. Thereupon Coveyeau answered the question, stating that he mentioned the subject of his accomplices to Flowers, but did not say who they were, and denied making the statement to Flowers that the men who were with him in the robbery were from Chicago, and that he had named Gallagher and Preston to the prosecution as being with him, because he knew they would have no trouble in clearing themselves.

It is admitted by Mr. Robison, upon the part of the people in the argument before us, that the ruling of the court was erroneous, and that Mr. Flowers was a competent witness for the purpose of impeaching Coveyeau.

This Court said in the case of *Alderman v. People*, 4 Mich. 422, 423:

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"It is a rule of law that no witness shall be required to answer any question that may tend to criminate himself, yet the accomplice, when he enters the witness-box with a view of escaping punishment himself by a betrayal of his co-workers in crime, yields up and leaves that privilege behind him. He contracts to make a full statement,—to keep back nothing,—although in doing so he may but confirm his own guilt and infamy. If he fails to do so in full, if he knowingly keeps back any portion of the history of the crime he undertakes to narrate, he forfeits his right to pardon, and may be proceeded against and convicted upon his own confession, already made. We think an accomplice who makes himself a witness for the people should be required to give a full and complete statement of all that he and his associates may have done or said relative to the crime charged, no matter when or where done, or to whom said. He should be allowed no privileged communications." See, also, *Foster v. People*, 18 Mich. 265; *Hamilton v. People*, 29 Id. 173.

It is also well settled that the privilege is that of the client, and not of the attorney. Therefore, if the client waives it, the attorney cannot insist upon it.

We are satisfied that in the case of one who has admitted his connection with a crime, testifying against another as his accomplice, not only the people, but the defense, are entitled to the whole story, and to all that the witness has said or done in relation to the offense up to the time of the giving of his testimony, including confidential communications to his attorney. As far as the crime in question is concerned, he has, by going upon the stand and acknowledging his participation in it, waived all privilege as regards it, as the reason of the privilege has been removed by his own act. And if he should be shown by such communications to have committed perjury, even on such trial, these communications, being made in reference to another crime than perjury, and before the perjury is committed, stand upon the same footing as any other statements made out of court before or during such trial, as they were only privileged in reference to a crime which he has admitted, and offered to make a full

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breast of, and not in reference to some crime that he might commit in the future, but had no thought of when the statements were made.

But the statements made by Coveyeau to Flowers could not be admitted in evidence to impeach him, except in the same way that other statements of his out of court would be admitted. It was his right, and the right of the prosecution, to have his attention called to them before they could be admitted.

A careful examination of the record shows that the claim of the people on the argument here is correct, that Mr. Flowers, although taking his supposed privilege upon some questions put to him, did in the end answer every material question relating to any matter of such communications to which the attention of Coveyeau had been directed, and that he corroborated the testimony of Coveyeau in so far as he gave evidence to any fact or statement of which inquiry was made of Coveyeau.

The only material questions asked Coveyeau about his conversation with Mr. Flowers were these:

"*Q.* Did you have a conversation with Charles Flowers in jail?

"*A.* Yes, sir.

"*Q.* At or about the time it was reported that you had told who your accomplices were?

"*A.* Yes, sir.

"*Q.* And did you have a conversation with him in reference to whom your accomplices were?

"*A.* No, sir.

"*Q.* Did you have a conversation with him in jail?

"*A.* I had a conversation with Mr. Flowers in jail.

"*Q.* Now, I put the question, did you have a conversation with him in regard to who your accomplices were?

"*A.* I did not say who they were; I just merely spoke about the subject.

"*Q.* Did you have any conversation with him in the jail?

"*A.* Yes, sir; something to that effect.

"*Q.* Did you there state to him that you answered hastily; that the men who were with you were strangers to the police;

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that you named the men that you had, Gallagher and the other, because you knew it would be so easy for them to clear themselves?

"*A.* I made no remark of that kind. * * *

"*Q.* Did you say, in substance,—I don't care about the words,—did you not say, in substance, when Mr. Flowers reproved you for making any such statement,—did you not say to him: 'They came to me, and in a hurry I named the men; the men who were with me were strangers to the police, but I named these men, because I knew they would have no trouble in clearing themselves?'

"*A.* I didn't say that. * * * * * *

"*Q.* What did you say to him about your accomplices being strangers here?

"*A.* I don't remember saying anything of that kind.

"*Q.* From Chicago—Did you say to him that you named those men because you was in a hurry, it was put upon you, and you knew they could clear themselves?

"*A.* I don't remember making any such remarks.

"*Q.* You swear you didn't say that?

"*A.* Yes, sir. * * * * * * * *

"*Q.* Did you, then, tell him that you had given the names of two men, but they never could be convicted; did you tell him that?

"*A.* I don't remember.

"*Q.* Just now you said you didn't remember. Do you swear you di In't say so?

"*A.* I swear I didn't say so."

Mr. Flowers, in answer to questions put by respondent's counsel, testified, among other things, as follows:

"*Q.* During that interview did Coveyeau tell you that the men who committed the crime with him were strangers, and lived in Chicago?

"*A.* He did not.

"*Q.* Did he not tell you at that time, in reply to your question as to whether he had confessed and named his accomplices, —did he not say: 'I was in a hurry, and pushed, and I named those men that I did name because I knew that they could be easily cleared, and that they could never convict them?'

"*A.* He did not state that to me.

"*Q.* In that conversation did he say or intimate that either Preston or Gallagher were his actual *bona fide* accomplices in that crime?

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"*A.* That is rather an embarrassing question to put to me.

"*Q.* You were also the attorney for Preston?

"*A.* Yes, sir.

"*Q.* I can only put the question, and shall have to leave it to you. In that conversation did he say or intimate that either Preston and Gallagher were his actual *bona fide* accomplices in that crime?

"*A.* That is a very embarrassing question to put to me. My refusal to answer that question may intimate one thing or another, and I do not wish it to do that.

"*Q.* Well, we are in your hands. I hope you will see it your duty to try and subserve justice here, without any sacrifice of what you claim to be your personal privilege.

"*A.* The names of Gallagher and Preston were not mentioned."

Although the defense had some trouble in getting the answers, still it will be seen that all the matters inquired of Coveyeau in relation to this conversation were testified to by Flowers. Beyond that they were not authorized to go. Therefore we are satisfied that no harmful error was committed.

It is alleged as error that the court instructed the jury that the respondent might be convicted upon the testimony of Coveyeau, even if he was uncorroborated upon any material fact, if they believed his testimony beyond a reasonable doubt. A person charged with crime in this State can be convicted upon the evidence of an accomplice, without any corroboration or confirmation of such testimony from other sources. *People v. Jenness*, 5 Mich. 305; *Foster v. People*, 18 Id. 271; *People v. Schweitzer*, 23 Id. 301; *Fisher v. People*, 20 Id. 135; *Hamilton v. People*, 29 Id. 188.

It is objected that the circuit judge said to the jury:

"It appears from the testimony of Coveyeau, and there is no testimony to the contrary, that the defendant, Gallagher was armed."

It is urged that this fact was for the jury to find, and that it entered materially into the crime charged, making the offense of robbery aggravated in its character; and that

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such statement of the court was untrue, as Coveyeau did not testify that respondent was armed, and there was no evidence to warrant any finding by the jury that he was armed.

It is true that Coveyeau did not testify that Gallagher was armed, but there was plenty of evidence tending to show that Coveyeau and some of the others had revolvers, and discharged them, and beyond doubt Captain Holt was wounded in the leg by one of them.

As a matter of law, if these four men were engaged in this robbery, acting together and in concert, and one of them was armed with a dangerous weapon, all the others were also guilty of the crime charged, whether they were any of them armed or not. Therefore this statement of the court could not have affected the verdict.

Vrooman, an inmate of the county jail, awaiting trial on a charge of larceny in the day-time from a school-house, gave testimony for the defense that Coveyeau told him while in such jail that the parties engaged with Coveyeau in the robbery of Holt were in Chicago, and, when Vrooman asked Coveyeau why he had implicated Preston and Gallagher, responded:

"I don't give a G—d d—n for Gallagher; I am not going over the road alone."

He refused to answer some questions on cross-examination, for the reason that the answers might criminate him.

Counsel for respondent asked the following instruction:

"Because the witness Vrooman refused to answer any question which he believed would tend to criminate him is no good reason why he should not be believed as to what he said."

The court did not give this request, and in that connection said:

"As far as the testimony of Vrooman is concerned, gentlemen of the jury, you can give it such credit as you think it deserves."

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This is assigned as error.

It was held by this Court in *Carne v. Litchfield*, 2 Mich. 344, in an action for an alleged assault and for false imprisonment, that the trial court erred in stating to the jury that the defendant Litchfield's refusal to answer a question propounded to him, on the ground that his answer might criminate him, was not evidence against him in the cause, yet it was impossible to prevent the jury from having the whole case, and knowing what was done in open court in the course of the trial before them, or to prevent counsel from commenting upon it; and this Court, by WHIPPLE, J., said:

"The ruling of the court excluding any references of guilt from Litchfield's refusal to answer questions, the answer to which might criminate him, was correct. The error of the court consists in making a suggestion, in the hearing of the jury, the effect of which might deprive the defendant of the full benefit of the rule of law which governs in such circumstances."

In *Foster v. People*, 18 Mich. 273, it was attempted to apply this ruling to the case of a witness who testified as an accomplice. The doctrine that no inference could be permitted against a witness because he asserts the privilege of refusing to answer a question on the ground that the answer might criminate him was again sustained, following *Carne v. Litchfield*, 2 Mich. 340, and citing *Rose v. Blackmore*, Ryan & M. 382; *Lloyd v. Passingham*, 16 Ves. 64; and *Knowles v. People*, 15 Mich. 408.

But it was held that the rule did not apply to a witness who was testifying as an accomplice, upon the ground that, by furnishing in the first instance criminating proof against himself as well as the accused, the witness could not stop short where he pleased in his story, but must be considered as having waived his privilege, and therefore must submit to the fullest and most searching inquiry.

The question came again before this Court in the case of *People v. Maunausau*, 60 Mich. 15 (26 N. W. Rep. 797).

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The writer of this opinion in that case said (page 20) that, if the question was open to discussion in this State, he would be inclined to hold differently from the ruling in *Carne v. Litchfield, supra,* but, in deference to what seemed to be the settled law of the State, and to the opinions of the other members of the Court, acquiesced in the principle that no inference could be drawn against a witness on account of the claiming of his privilege of not answering. See, also *People v. Brewer,* 27 Mich. 134. But the present case can, I think, be distinguished from the others in this State, and the old rule preserved, if there be any virtue in it. In *Carne v. Litchfield,* 2 Mich. 340, and *Knowles v. People,* 15 Id. 408, the rule was applied to the case of the defendant testifying in his own behalf. In *Foster v. People,* 18 Mich. 266, the Court refused to apply the rule to a witness who was testifying as an accomplice, as heretofore stated. In *People v. Maunausau,* the witness Navarre was asked, on cross-examination, if he had not at a certain time stolen goods, and he refused to answer, claiming his privilege. The question he thus refused to answer was one not connected with or relating to his testimony in chief, but one propounded to him for the express purpose of showing that he had been guilty of a crime. Without doubt, in that case, he had a right to claim his privilege, and was doing so in good faith.

But here the case is different. Vrooman, who was in the Wayne county jail awaiting his trial on a charge of larceny, testified that, on a certain occasion in the jail, Coveyeau told him that the parties implicated with Coveyeau were in Chicago, and when witness asked Coveyeau why he had implicated Preston and Gallagher he replied:

"I don't give a G—d d—n for Gallagher; I am not going over the road alone."

It appeared that, after the time he claims Coveyeau told him this, Vrooman was in the same ward with Preston and Gallagher, but failed to inform them what Coveyeau had said

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to him. He was asked, on cross-examination, why he did not tell them. He said at first:

"I decline to answer.

"*Q.* Why?

"*A.* That is all; I decline to answer.

"*Q.* I want to know why you decline to answer.

"*Mr. Straker* (counsel for respondent). Such a question or such an answer requires another question, and that is, would your answer criminate you?

"*Mr. Robison* (prosecuting attorney). Of course, if he says so, that is the end of it. I suggest that in the long experience this witness has had he does not need to have that suggestion from eminent counsel.

"*Mr. Straker.* The question should be put to him,—will your answer criminate or tend to criminate you?

"*Witness.* Yes, sir.

"*The Court.* That is entirely a personal privilege. Answer the question.

"*Q.* What was that you said?

"*A.* Well, it might go to criminate myself in some way. That is all I know about it.

"*Q.* It might go to criminate yourself in some way or other. That is the reason you did not tell Gallagher when you first went in there?

"*Mr. Straker.* No; he says it is the reason why he does not answer now.

"*Q.* Why didn't you tell Gallagher the first time you was in the first ward? Do you decline to answer that question?

"*A.* Yes, sir.

"*Q.* For what reason? (No answer).

"*Mr. Robison.* I wish the court would exercise the power that it has to make this witness answer that question.

"*Mr. Straker.* You can't make him open his mouth.

"*Q.* What is the reason you decline?

"*A.* I have my reasons.

"*Q.* What are they?

"*A.* I decline to answer the question.

"*Q.* Why do you decline. Would it tend to criminate you?

"*A.* It might in my future trial; yes, sir. * * * *

"*Q.* Why didn't you tell Preston?

"*A.* I decline to answer that.

"*Q.* Why do you decline to answer that?

"*A.* I told you just a moment ago.

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"*Q.* Is it for the same reason?

"*A.* That is the same question you put to me a moment ago.

"*Q.* No; I asked you why you didn't tell Gallagher when you first went in the ward.

"*A.* I thought you said Preston.

"*Q.* Now I say, why didn't you tell Gallagher?

"*A.* The same reason.

"*Q.* What is the reason?

"*A.* It might go to hurt me in the future trial.

"*Q.* How could it hurt you in your future trial?

"*A.* Criminate me.

"*Q.* Do you want this jury to understand that it might hurt you in your future trial or criminate you?

"*Mr. Straker.* That is objected to.

"*The Court.* I think you have gone into this thing pretty fully."

It will be noticed that the question which the witness declined to answer was not one in any way directed against his character, or put for the purpose of impeaching him, or affecting his credibility because of anything wrong or criminal that he had done, but a legitimate inquiry, in the line of his direct testimony. It will also be seen that he did not think of claiming his privilege until it was suggested to him by one of the counsel for respondent.

It does not seem to me that this privilege was claimed in good faith. But, whether it was or not, it would certainly be an obstruction to the course of justice to hold that this witness could tell his story as he did in chief, and then refuse to answer a fair inquiry directly in the line of his testimony, and yet the jury must find that this declination must not be considered by them as any reason why they should discredit his story. If this be the extent of the rule, then all a witness need do to prevent any cross-examination at all is to decline to answer under his privilege, and his direct testimony must stand unaffected by his refusal to be cross-examined.

I cannot go as far as this; and, in the present case, think

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the circuit judge was justified in refusing to give the proposed request, and in what he said as to Vrooman's testimony.

The testimony of respondent in the recorder's court in another trial—the trial of Preston for the same offense as the one charged against Gallagher in the case at bar—was properly admitted, not as impeaching testimony, but as his admissions; and it was competent also, although he did not testify as a witness in his own behalf in this case, to show that he had made contradictory statements at different times or in different places, in reference to his whereabouts on the night of the robbery, or of any other material fact affecting the issue of his guilt or innocence. The fact that Gallagher did not testify on the trial did not affect the introduction in evidence of his admissions or contradictory statements made outside of the trial, and before it took place.

Objection is made to the jurisdiction of the court. The trial was in the recorder's court of the city of Detroit, but it was presided over by the Hon. George Gartner, one of the circuit judges of the Wayne circuit.

The respondent's counsel claim that the record shows this assumed jurisdiction was obtained simply on the statement of Judge Gartner that he was requested to act by Judge Swift, of the recorder's court, the same being made of record on the second day of the trial, and after such jurisdiction had been assumed; and, further, that the Legislature has no power to authorize a circuit judge to act as judge of a municipal court.

Neither one of these objections is well grounded. The record shows that Judge Gartner was present as acting judge of the recorder's court of the city of Detroit, which is a sufficient showing under the law.

Act No. 456 of the Local Acts of 1887, which act is an amendment to the charter of the city of Detroit, provides (page 549) that—

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"Either of the judges of the circuit court for the county of Wayne may act as judge of said recorder's court, when requested to do so by the recorder, or in case of the absence, sickness, or incapacity of said recorder, or when there is a vacancy in the office of recorder."

A simple request of the recorder is all that is necessary under this act to give a circuit judge of Wayne county authority to sit in his stead as judge of the recorder's court. The showing of the right to act by the record is within the statute, and besides, in the absence of any showing to the contrary, the right of Judge Gartner to act would be presumed. *Landon v. Comet*, 62 Mich. 92 (28 N. W. Rep. 788).

I can see no good reason why this act is not constitutional, as far as cases are concerned of which the circuit court had original jurisdiction before the passage of the act. Further than this it is not necessary to inquire for the purposes of this case.

The authority granted the recorder's court to hear, try, and determine criminal cases alleged to have been committed within the city of Detroit has been held within the Constitution. Section 1, Art. 6.

This jurisdiction before the creation of the recorder's court was in the circuit court for the county of Wayne. If the Legislature had the power to divest the circuit court of its original jurisdiction of this class of cases, it has also the power to restore such jurisdiction, if it sees fit in the future to do so; and, having this power, there seems to be no valid reason why it cannot in certain cases provide that a judge of said circuit court may sit temporarily as judge of the recorder's court.

The sixth assignment of error is that—

"The verdict was contrary to the law and to the evidence and the weight of evidence, and because the sentence was excessive, and not in proportion to the gravity of the offense."

It is sufficient to say in this respect that we have thus far

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found no errors of law to the respondent's prejudice, as heretofore shown; and we have examined fully the whole case, and are satisfied that the verdict was a just one, and that the respondent's sentence is none too heavy in a case like this, where robbery would have been supplemented with murder had the aim of the robbers been more accurate.

The judgment is affirmed.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

75	527
105	678
75	527
106	85
75	527
115	200
75	527
153	490
153	492

JOSEPH W. CHADDOCK, PRESIDENT, ETC., v. FAYETTE S. DAY, JUSTICE OF THE PEACE.

Municipal corporations—Ordinances and by-laws—Police regulation—Restraint of trade—License fee.

1. The law will not allow the right of property or business to be invaded under the guise of a police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law. *Austin v. Murray*, 16 Pick. 126.
2. Where, under its charter, a village has the right to exact a license fee as compensation for the expense of the supervision of a lawful business or trade carried on therein, the exaction of a fee of $10 per month is excessive and unreasonable, and therefore void.
3. An ordinance of a village requiring the payment of a license fee of $10 per month for the privilege of selling fresh meat on the village streets, in less quantities than one-quarter of the slaughtered animal, is in restraint of trade, and not within the legislative power of the village to enact.

Application for *mandamus* to compel respondent to entertain a complaint and issue a warrant for the violation of a village ordinance. Submitted April 24, 1889. Denied June 28, 1889. The facts are stated in the opinion.

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C. R. Wilkes, for relator.

Pope & Hart, for respondent.

MORSE, J. Application for *mandamus*.

April 17, 1882, the president and board of trustees of the village of Allegan adopted the following by-law, being No. 16 of the by-laws of said village:

"It shall not be lawful for any person to sell or offer for sale, on any street in the village of Allegan, any fresh meat of any animal, in pieces or quantities less than one-quarter of any such animal, without first paying into the village treasury the sum of ten dollars in advance for each month, and obtaining from the clerk a permit for such sale. Any person violating any of the provisions of this by-law shall, on conviction thereof, be punished by a fine in a sum not less than $15.00, nor more than $25.00, or by imprisonment in the county jail for a period not exceeding 30 days."

It is alleged in the petition for *mandamus* that one Charles Schermerhorn, of said village of Allegan, did, on the twenty-sixth day of January, 1889,—

"Go about from place to place, and from street to street, selling fresh meat of beef and swine in pieces and quantities less than a quarter of such animals, on the public streets in said village, contrary to the provisions of said by-law 16."

And that on the eighth day of February, 1889, the relator, as president of said village, made a complaint in writing and on oath before Fayette S. Day, the respondent, a justice of the peace in and for the township of Allegan, in which township the said village is situated, praying for the issuing of a warrant by said justice for the arrest of said Schermerhorn for violating said by-law.

Relator further alleges that the charter of the village requires all prosecutions for violations of the ordinances and by-laws of said village to be brought before some justice of the peace of the said township of Allegan, and authorizes such justice to issue a warrant for the arrest and apprehension of any offender against said by-laws; and that there is

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no other method of enforcing the provisions of said by-law No. 16, except by complaint and warrant. See sections 1, 2, art. 30, Act No. 300, Local Laws of 1883, pp. 518, 519.

The said justice of the peace refused to entertain said complaint, and refused to issue a warrant.

There are but two justices of the peace residing in said township of Allegan, the respondent and James E Fuller, and it is shown by the petition for the writ that Fuller was ill and unable to attend to business.

The writ of *mandamus* is asked to compel the said Fayette S. Day to entertain the complaint against said Schermerhorn for the violation of said by-law, and to issue his warrant for the arrest and apprehension of said Schermerhorn, that he may be apprehended and held to answer said complaint, and further dealt with in relation to the same as law and justice may require.

The respondent makes answer to the order to show cause, heretofore issued by this Court, in which he admits that relator is president of the village of Allegan, and authorized to see that its ordinances and by-laws are enforced, and that the by-law in question was adopted by the president and trustees of said village; but he alleges that said by-law was never published in any newspaper printed and circulating in said village of Allegan, as required by the charter of said village, it being printed in the form of a supplement to the Allegan Democrat, a newspaper published and circulating weekly in said village, which said supplement, containing only said ordinances and by-laws, was folded in and put in circulation with the regular issues of said newspaper; and he alleges that this method of circulation is not a compliance with the provision of the charter.

He admits that relator made complaint as stated in the petition, and that he refused to entertain said complaint, because he believed, and still believes, that said by-law is illegal and void because the president and board of trustees

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had no power or authority, under the charter of said village of Allegan, to pass said by-law; and that said by-law is void because it is unreasonable, and in restraint of trade; and that the only object and effect of said by-law No. 16 is to restrain certain persons from selling fresh meat in quantities less than one-quarter of an animal, so as to protect those selling at retail in their shops.

He also submits that the by-law is void because not published according to law, as heretofore stated.

He further answers that there has never been any public market fixed or established in said village, and no rule, ordinance, regulation, or by-law has ever been adopted or passed by the board of trustees establishing or regulating a market or markets in said village; and he submits that said by-law No. 16 does not provide for regulating or licensing "hawkers, hucksters, or peddlers" under the power given in the charter of said village, and that its effect is to discriminate unjustly in favor of a certain class of persons in the business of selling fresh meats, and against other persons in the same business, and that said by-law provides for an unjust tax, and not for a license fee.

We do not consider it necessary to determine whether the by-law was properly published under the law.

It is claimed by counsel for the relator that this by-law No. 16 is within the powers granted to the president and board of trustees of the village of Allegan under its charter, and such counsel places it as a by-law regulating and licensing peddlers, and claims that section 2, subd. 10, art. 6, of the charter authorizes them to license and regulate—

"Hawkers, hucksters, and peddlers within the limits of said village, and to require the payment of reasonable license fees."

This subdivision 10 (in connection with section 2) reads as follows:

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"The board of trustees shall have full power within said village to license and regulate theaters, shows, traveling concerts, auctioneers or auction sales, gift enterprises, *hawkers, hucksters, peddlers,* and pawnbrokers, or prohibit them from soliciting patronage of the community within the limits of said village; and to require the payment of reasonable license fees."

By an examination of the ordinances and by-laws of the village of Allegan, it appears that the subject of licenses is treated under by-laws Nos. 11 and 19, No. 11 being devoted entirely to auctioneers. But the amount of license fees, and the regulations relative to "hawkers, hucksters, and peddlers," are found entirely within by-law No. 19. Peddlers and hawkers of any articles, except fruit, food, or feed, are charged a license of $5 per day. Stand licenses are placed at $1 per day. No license is anywhere required for, or any tax placed upon, the sale of food, except in the case of those selling fresh meats in the quantities, on the street, as mentioned and prescribed in by-law No. 16.

We do not think this by-law can be sustained as a regulation of hawkers or peddlers, as it is evident it was not so intended by its framers. Indeed, it appears to be open to the charge of the respondent that it was passed in the interest of the persons in said village selling fresh meat in shops, and in restraint of trade.

It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and

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devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly within the legitimate power of Congress, or the state or municipal legislatures.

In the present case the argument is strenuously made that the village has the right to regulate the selling of fresh meats, under the authority of subdivision 10, and that such a regulation is not in restraint of trade; that the imposition of the payment of $10 monthly is not a tax, but a license, and that it is not in restraint of trade, and the license fee is not unreasonable. The counsel for relator cites a large number of cases in support of his position.

It is conceded that no public market has ever been established in the village, and that there have never been any market regulations, and it is not pretended that by-law No. 16 was intended as a market regulation.

It is not passed under any authority to regulate the use of the public streets, nor yet can it be said to be an exercise of the police power in the interest of the public health. It does not prohibit the sale of fresh meats in the streets, in quantities above the quarter of an animal, and has no reference whatever to the character or condition of the meat sold. It must be sustained, if it can be sustained at all, under the tenth subdivision of section 2 of the charter, heretofore quoted, and the counsel for the relator substantially admits this in his argument.

A sufficient answer to this plea would be that it manifestly was not intended as an exercise of power under this subdivision. It is evident that it was simply an exercise of arbitrary and unauthorized class legislation for the benefit of a few shop-keepers, and an unjust discrimination against those who desired to sell from carts or wagons about the village. It is difficult to perceive how such a by-law could be of public benefit. Its tendency would be, if enforced, to increase the price of fresh meat to the consumer, while it could serve

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no useful or beneficial purpose, as an offset to this increased cost of an article of daily and necessary food. In almost every case cited by the relator's counsel to sustain this by-law there was a public market in the village or city, and such a by-law was adjudged valid upon the ground that it was a market regulation. See *Buffalo v. Webster*, 10 Wend. 102; *Bush v. Seabury*, 8 Johns. 418; *Chicago v. Bartee*, 100 Ill. 57; *Rochester v. Pettinger*, 17 Wend. 265; *Nightingale's Case*, 11 Pick. 168.

In *Ash v. People*, 11 Mich. 347, 352, an ordinance prohibiting persons from keeping a meat market, or stand outside of the market, without a license, was held valid by a majority of the Court, on the ground that the license fee of $5 a year was a reasonable market regulation for the indemnity of the city for the expense of attending to the supervision of the business at the place licensed; but in the present case there is no market established in Allegan, and, consequently, no market regulations.

The business engaged in by Schermerhorn is an innocent and useful one, and sanctioned by the general laws of this State; and, if it be conceded that the village authorities, under the charter, have a right to exact a license fee as a compensation for the expense of the supervision of the trade, yet the fee proposed to be exacted by by-law No. 16, to wit, $10 per month, is excessive and unreasonable, and therefore void.

Nor can it be sustained under any claim of an exercise of the police power for the benefit of the public health, or in the preservation of good order in the community, and there is no showing anywhere in the record that the by-law was passed for the benefit of the health of the people of the village, or in the maintenance of good order. And it is not easy to see how the business of selling meat, as carried on by Schermerhorn, would be any more prejudicial, either to the health or good order of the community, than if he was sell-

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ing in a butcher shop. Nor would the exaction of such a license or tax as the one prescribed in this case be the proper method of police regulation, in case either the public health or order was liable to be imperiled by this method of selling fresh meat. The control and regulation of the business, to guard against either the danger to the health or good order of the community, would, if of any benefit, have to be exercised in other ways than by the imposition of a license fee or tax upon all dealers from carts or wagons alike, without reference to anything save the business they were engaged in, and so heavy as to be in effect a penalty rather than a license.

This by-law, as before said, had its purpose, which was not in the direction of a police regulation, but in restraint of trade. The law will not allow the right of property or business to be invaded under the guise of a police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law. *Austin v. Murray*, 16 Pick. 126.

The by-law in question here, in effect, gives the right to sell fresh meat to a few in exclusion of all others. It would tend to greatly enhance the price of a necessary article of food, and to compel a loss of time, by forcing all the people of Allegan to resort to the butcher shops to procure their daily supply. "If all fresh meats may thus be controlled in their sale, all kinds of meats, bread-stuffs, vegetables, and fruits may be brought under the same restriction." If this may be done, the business of selling food would fall into the hands of the few, and all competition outside of the shops and stores would be destroyed, and the people oppressed. Such a by-law is not reasonable, and, in this case, the license fee or tax, whichever you may call it, is so extortionate as to make it almost prohibitory. See *Bloomington v. Wahl*, 46 Ill. 489, 494; *Chicago v. Rumpff*, 45 Id. 90; *Dunham v. Rochester*, 5 Cow. 462; *Barling v. West*, 29 Wis. 307; *Hayes v. Apple-*

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ton, 24 Id. 542; *Gale v. Kalamazoo*, 23 Mich. 344; 1 Dill. Mun. Corp. §§ 253, 256, 296.

The writ must be denied, with costs against the relator.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

HIRAM HARRINGTON v. HENRY L. HOLCOMB AND TRUMAN W. WHITNEY.

Contract—Equity—Specific performance—Evidence.

A party who seeks to enforce the specific performance of a contract is called upon to make out a *plain* case, and establish it by his proofs.[1]

Appeal from Gratiot. (Hart, J.) Argued April 24, 1889. Decided June 28, 1889.

Bill for specific performance of contract. Complainant appeals from decree dismissing bill. Decree affirmed. The facts are stated in the opinion.

James K. Wright (*Isaac Marston* and *C. J. Willett*, of counsel), for complainant.

Giddings & Crandall (*John Moore*, of counsel), for defendants.

CHAMPLIN, J. In 1867 defendant Henry L. Holcomb was the owner in fee of a large quantity of land in the county of Gratiot, in this State, and on the twenty-ninth day of June,

[1] See *Dunton v. Outhouse*, 64 Mich. 419 (head-note 2).

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1867, he conveyed an undivided half thereof, together with a half interest in certain personalty, to Thomas Holcomb for the consideration of $40,000, and took his obligations to pay therefor, said Thomas Holcomb making no payment down.

On the twenty-sixth day of July, 1867, said Henry L. Holcomb conveyed the other undivided half of said real and personal property to John L. Evans for $42,500, $10,000 of which sum was paid down, and a mortgage given back upon the said lands of $32,500, to secure the payment of the balance. This mortgage was duly recorded.

Portions of these lands were timbered with pine of great value, and another portion was lying in and contiguous to the village of St. Louis, in said county.

Thomas Holcomb and Evans formed a copartnership, and engaged in the business of lumbering, and cut off and sold about 13,000,000 feet of pine from said land, worth at least two dollars a thousand stumpage.

The defendant Henry L. Holcomb, then a resident of the state of Connecticut, advanced to the firm of Holcomb & Evans considerable sums of money, and indorsed their notes, whereby they became largely indebted to defendant Henry L. Holcomb.

The firm continued business until December, 1873, but had not paid anything upon the indebtedness due the defendant Henry L. Holcomb, and being in embarrassed circumstances, they reconveyed to him a large portion of the land purchased for $46,000, which was applied equally upon the indebtedness due him from the individual members of said firm. After applying said proceeds there was still left due from John L. Evans, of the original purchase price, something over $27,000.

In the month of October, 1873, Henry L. Holcomb visited St. Louis to examine into the financial condition of the firm, and at that time found Mr. Evans in charge of the business. He also saw the complainant, who represented that the firm

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owed him $2,400 or over, and he told defendant Holcomb that he could not get his pay, and spoke about throwing them into bankruptcy. Defendant Holcomb then said to him that he and Thomas Holcomb would be out there within a month or so, and he expected to take the property back, and the debts would all be paid, and he replied with that view he would wait.

On the twentieth day of November, 1873, a contract in writing was entered into, which was signed in the firm name of Holcomb & Evans, but made, and the signature of the firm affixed, by Evans, for the sale to complainant of a parcel of land in the township of Pine River, Gratiot county, Michigan, consisting of five acres lying in or adjacent to the village of St. Louis. This land was a portion of the tract sold by defendant Henry L. Holcomb to Thomas Holcomb and to John L. Evans, and upon which the mortgage was executed by Evans to defendant Holcomb. The contract expressed the consideration to be $500, and Harrington agreed to pay this sum within thirty days from the above date. The contract was signed by the vendee. It also contains the following indorsement:

"November 20, 1873, received on the within contract $500 (five hundred dollars) in full. HOLCOMB & EVANS."

This receipt was signed by Mr. Evans.

The complainant did not pay cash for the land, but the firm of Holcomb & Evans were indebted to him, and the purchase price was applied upon such indebtedness.

In February or March, 1874, defendant Henry L. Holcomb paid to complainant, Harrington, the amount of indebtedness claimed by him to be due from Holcomb & Evans, amounting to about $2,400.

The land described in the contract was in a cleared field, containing considerably more than the five acres agreed to be conveyed, and, previous to the contract being signed, Harrington had caused the same to be surveyed and staked

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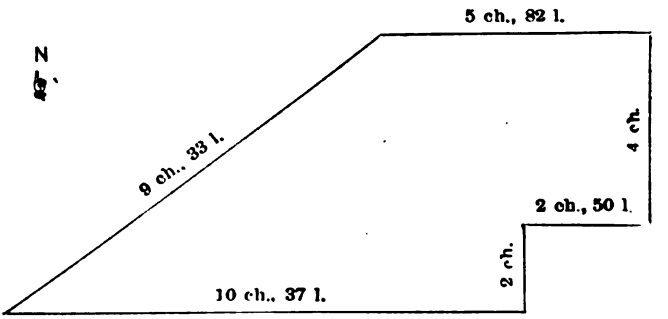
out. The following plat will show the shape of the parcel of land, the distances being in chains and links:



The north and west sides are bounded by highways. Thomas Holcomb was not in the State when the survey was made, and he testifies that the contract was not made with his knowledge or consent. Harrington assisted in making the survey, and it was made under his instructions. Evans was not present.

Harrington testifies that he entered into possession, but the only act of possession he testifies to was an offer to trade off a lot for a house, which trade was not consummated.

Henry L. Holcomb, after his re-purchase, entered into actual possession, and caused the whole field to be plowed and cultivated as farming land. The complainant claims that before he made the purchase he knew that defendant Holcomb's mortgage from Evans covered the premises in question, and that he had an interview with defendant Holcomb, and told him he was negotiating for the purchase of the five acres, and desired to know from him if he should buy if he would release the same from his mortgage, and that defendant Holcomb assured him that he would, and upon the strength of this assurance he made the purchase, and paid the purchase money in the manner stated. This statement is

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positively denied by defendant Holcomb, who says that he did not know of the contract of purchase until after he paid complainant the $2,400 indebtedness above stated, and a short time after he had done so complainant claimed he had purchased five acres, and asked him to give to him (Harrington) a quitclaim deed of it, and he refused to do so.

Afterwards, in May, 1875, complainant employed the law firm of Wright & Whitney to file a bill in the circuit court of Gratiot county to compel Thomas Holcomb and John L. Evans to specifically perform the contract. Henry L. Holcomb was not made a party to the bill. A notice of *lis pendens* was, however, filed in the proper office. The conveyance from Thomas Holcomb to Henry L. Holcomb, made in December, 1874, of his undivided half of the lands, was not recorded until the twenty-seventh day of April, 1878, and complainant claims that he did not know of such conveyance until after it was recorded.

The suit for specific performance was not prosecuted, and Henry L. Holcomb filed his bill to foreclose the Evans mortgage, a decree was obtained, and the premises were sold thereunder in March, 1880, to defendant Henry L. Holcomb.

In February, 1882, defendant Holcomb sold and conveyed a portion of the premises in question to Truman W. Whitney, who gave back a mortgage to secure payment of a portion of the purchase money. Two other portions were also sold and conveyed, viz, about one-eighth of an acre to the St. Louis Driving Park, and about three-fourths of an acre to a railroad company for a right of way. Mr. Whitney was one of the members of the firm of Wright & Whitney, who filed the bill for specific performance in 1875. He can claim no greater rights than his grantor had at the time of the conveyance to him.

On the eleventh of February, 1884, the complainant filed this bill praying for a specific performance of said contract. The only parties made defendants are Henry L. Holcomb and.

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Truman W. Whitney. He prays that defendant Whitney may be decreed to hold the legal title to the premises in trust for complainant, and that he be required to convey the same to him, and that defendant Holcomb be required to discharge from the operation of the mortgage thereon the said premises.

The testimony is very conflicting upon the merits of the controversy. A party who seeks to enforce the specific performance of a contract is called upon to make out a plain case, and establish it by proofs. It is not satisfactorily shown that the land in question was partnership property, and the authority of Evans to enter into a contract to convey it as such is not established. The contract might carry his undivided half interest in the land, but that has been cut off by the foreclosure sale. The agreement to release the mortgaged premises is not established satisfactorily. It requires an agreement in writing to convey, or to agree to convey or relinquish, an interest in lands. There was no agreement in writing in this case to release, and no consideration is shown for the alleged promise to release.

With reference to the alleged agreement to release this land from the operation of the Evans mortgage, the only evidence to sustain the allegation is the testimony of complainant, and his testimony is denied by the defendant Holcomb. The circumstances do not convince us that the complainant's testimony should be given the greater weight. At the time he claims the promise was made, Holcomb & Evans were in embarrassed circumstances. They had paid nothing of the large indebtedness due to defendant Holcomb. They had cut off over $26,000 worth of pine from the land covered by the mortgage, and the security had become greatly diminished. He was then contemplating the necessity of taking back the property sold in order to save their indebtedness to him. They were threatened with bankruptcy proceedings, and in order to repossess the property Holcomb would have

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to become responsible for their debts as against creditors in bankruptcy. In view of all this, it is quite unlikely that he would promise to release his security on the land in question without consideration, for that security was valid, as against creditors, whether the firm were thrown into bankruptcy or not.

The testimony of Evans upon the subject of releasing in general is contradicted by both Thomas Holcomb and the defendant Holcomb, and with reference to releasing this particular piece of land, in view of his cross-examination, his testimony is not reliable.

We are of opinion that the circuit judge arrived at a correct result, and the decree entered below is affirmed, with costs.

MORSE, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

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FRED STRAWSINE v. JOHN SALSBURY.

Body execution—Imprisonment—Discharge of debtor—Revival of judgment.

The imprisonment of a defendant on a body execution issued on a judgment in a civil suit is a satisfaction of the debt, and his discharge by reason of the failure of the plaintiff, on demand, to pay the expenses of his board and keeping, will not revive the judgment.

Error to Shiawassee. (Newton, J.) Submitted on briefs June 4, 1889. Decided June 28, 1889.

Action on a judgment, and for board of the judgment debtor while imprisoned on a body execution. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Matthew Bush (*A. R. McBride*, of counsel), for appellant.

John T. McCurdy (*Hugh McCurdy*, of counsel), for defendant.

LONG, J. This is an action commenced in justice's court to recover on a judgment previously rendered in a justice's court between the same parties, and for board of the defendant while in prison on an execution on such judgment.

The defendant had been arrested and imprisoned in the county jail on the former judgment for about six weeks, and his counsel claim that such imprisonment released the defendant from all further liability on such judgment. The plaintiff's claim is that such imprisonment did not relieve the debtor from his obligation to pay the judgment.

The suit was commenced one day before the judgment would have been barred by the statute of limitations.

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Plaintiff had judgment in the justice's court, and defendant appealed to the circuit, where on a trial before a jury he prevailed. Plaintiff brings the case to this Court by writ of error.

The only point argued by plaintiff's counsel in this Court is upon error assigned on the following portion of the charge of the trial court:

"I will charge you in this case that if you find from the evidence that the defendant in this suit was arrested and imprisoned on the execution issued on the original judgment rendered by and before Mr. Peter C. Carruthers, a justice of the peace, as testified to by him, and that an execution was issued and placed in the hands of Albert Frain, a deputy-sheriff of this county, for execution, and that by virtue of said execution the defendant was arrested and imprisoned in the county jail, and if you further find that the plaintiff authorized such arrest and imprisonment by himself personally or by an attorney, and that the defendant was kept in jail under such arrest for six weeks, and his board during that time was paid for by the plaintiff in this suit, or by his agent for him, and if after that time the plaintiff or his agent refused further to pay such board to Mr. Clark D. Smith, then the sheriff of this county, after plaintiff or his agent had been appealed to for that purpose, and a reasonable time afforded him or his agent to do so, and that they refused or unreasonably neglected to do so, and that the sheriff then released the defendant from custody, plaintiff would not be entitled to recover."

Error is also assigned upon the following portion of the charge:

"There has been no testimony given in the case to support any claim except the claim upon the judgment; no proof here or claim in the declaration for any amount of money paid for the board and maintenance of this party while he was in jail, or at his request or for his benefit. There is no evidence under the pleadings in the case which will entitle the plaintiff to recover for anything beyond the amount of the judgment, $25, and $10 costs, and the interest thereon from that time, if you find the case as I have presented it to you."

This claim is not insisted upon here, or argued, and will be treated as abandoned.

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How. Stat. § 8960, provides:

"That, whenever any person shall be committed to any jail by virtue of an execution issued or proceeding founded on a judgment rendered in any civil suit, the plaintiff or defendant at whose instance such person shall be so imprisoned shall pay on demand, to the sheriff or the keeper of the common jail of the county, the expenses of the board and keeping of such person so imprisoned; and the said sheriff or keeper of said jail shall not be required to retain such person any longer in jail than such expenses of said board and keeping shall be paid in advance, nor shall such expenses constitute any charge against the county."

The court was not in error in this charge. It is well settled at the common law that the detaining of the body in execution is a satisfaction of the debt, and you cannot afterwards take the goods. *Cooper v. Bigalow*, 1 Cow. 56; *Lathrop v. Briggs*, 8 Id. 171; *Ransom v. Keyes*, 9 Id. 128.

It is contended, however, by counsel for the plaintiff, that the plaintiff was not in fault for the discharge from custody, and did not consent thereto, and that the discharge of the defendant from custody for failure to pay the board and expenses of keeping, etc., as provided by statute, operated to revive the judgment. This is not so. The statute expressly provides that the party at whose instance such person shall be imprisoned shall pay on demand to the sheriff such expenses, and the sheriff is not required to retain such person any longer than such expenses are paid in advance.

The court fairly submitted the question to the jury as to whether the plaintiff or his agent, after being appealed to to pay such expenses, neglected and refused to pay the same, and if they unreasonably neglected to do so after such demand, and the sheriff thereupon released the defendant, the plaintiff could not recover. The court, in a further instruction, expressly told the jury, if they found that the plaintiff or his agent was not notified to pay such expenses, and did not neglect to do so, and that the sheriff let him go without the

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knowledge and consent of the plaintiff or his agent or attorney, then the plaintiff would be entitled to recover the amount of such judgment, costs, and interest. If either party had a right to complain of this portion of the charge it was the defendant.

Counsel now insist that the court was in error in stating to the jury that, if the plaintiff's *agent* refused to pay the expenses on demand, the sheriff would have the right to discharge the defendant, and no recovery could be had. It is evident from other parts of the charge that in speaking of the plaintiff's *agent* the jury must have understood the court to have reference to the plaintiff's attorney, and the demand, as it appears from the record, was made by the sheriff upon him for the payment of such expenses. No demand was ever made upon the plaintiff personally.

Mr. McBride, an attorney at law, was the attorney in the case, and it appears took the execution, and delivered it to the sheriff for service, and from him the sheriff received his expenses for keeping the defendant, so far as any such expenses were paid. He seems to have had the entire control and direction of the matter, with authority to issue execution, and to enforce and collect the judgment, and under these circumstances, and in the absence of proof to the contrary, it will be presumed that he did not exceed his authority. When demand was made for further expenses, he neglected to pay it, and by reason of such neglect or refusal the sheriff refused longer to keep the defendant in custody.

The imprisonment itself operated as a satisfaction of the debt, and the discharge did not revive the judgment. This is not an action against the sheriff for an escape, but an action on a judgment which was satisfied by the arrest and imprisonment.

We find no error in the record of which plaintiff can complain, and the judgment must be affirmed, with costs.

The other Justices concurred.

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THE SECOND NATIONAL BANK OF RICHMOND, INDIANA, v. GEORGE W. WHEELER AND THOMAS FINLEY.

Bills and notes—Agreement held not a promissory note—Warranty —Evidence.

1. An *agreement* to pay a fixed sum of money at a certain date, with 7 per cent. interest from date, and 8 per cent. interest after maturity, and 5 per cent. attorney's fees, without relief from homestead valuation or appraisement laws, to which is added a waiver by the makers and indorsers of presentment for payment, protest, and notice of protest and non-payment, with right to extend the time of payment, is *not* a promissory note.
2. Where the testimony in a suit to recover the price of a machine tended to show that it was bought upon trial, and the defense set up was its failure to fill the warranty under which it was sold, testimony in support of such defense is admissible as against the vendors, or third parties to whom they had transferred a non-negotiable agreement for the payment of a part of the purchase price of the machine.
3. In a suit involving an alleged breach of warranty of a threshing separator, evidence of witnesses who were unacquainted with said machine, and had never seen it work, that separators made and sold by the same manufacturers, and of the same pat ern and size as the one in question, worked well and gave good satisfaction, is inadmissible, having no tendency to show that the machine in controversy was properly constructed and did its work well.

Error to Kalamazoo. (Buck, J). Argued June 6, 1889. Decided June 28, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

O. T. Tuthill, for appellant.

Dallas Boudeman, for defendants.

CHAMPLIN, J. The plaintiff declared upon the following instrument as a promissory note, viz.:

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"$150. RICHMOND, IND., July 22, 1886.

"On or before the first day of November, 1887, the subscribers, of Alamo post-office, Kalamazoo county, State of Michigan, jointly and severally promise to pay the incorporated company of Gaar, Scott & Co., or order, one hundred and fifty dollars, payable at Kalamazoo National Bank, with 7 per cent. interest from date, and 8 per cent. after due, and 5 per cent. attorney's fees, without relief from homestead valuation or appraisement laws, for value received.

"The makers and indorsers of this note hereby severally waive presentment for payment, protest, and notice of protest and non-payment; and the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time when the same may be due and payable. GEORGE W. WHEELER.

"THOMAS FINLEY."

The defense was the general issue, under which the defendants set up special matters of defense, stating that if they ever signed the note it was part of an arrangement by which they purchased of Gaar, Scott & Co., a threshing separator about June, 1886.

"That the purchase price of said separator was to be $450, —$100 to be paid by a second-hand separator, then owned by the defendants, which they duly delivered to the said Gaar, Scott & Co., and the balance by certain notes to be executed by said defendants to said Gaar & Co.

"That for the purpose of making said sale and obtaining said notes said Gaar, Scott & Co., through its agent, warranted to the said defendants that the separator they purchased was a first-class separator, as good as any made, and that it would separate grain from the straw well; and that in case it did not do so, and did not work well, defendants were not obliged to keep it.

"That said separator was delivered to defendants; that they attempted to operate the same; that it was not a good, first-class separator; that it did not separate the grain from the straw well; that said Gaar, Scott & Co. were notified of the defect in the said separator; that they made several attempts to remedy it, but they were not able to do so.

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"That said separator was of no value, and that by reason of their using it said defendants were deprived of large sums of money in their business of running a threshing machine and separator.

"That in the month of June, 1886, after one of the servants and agents of the said Gaar, Scott & Co. had attempted to operate it, but failed in the operation of the said separator, a note, a copy of which is set forth in plaintiff's declaration, was signed by the defendants, but was not delivered to said Gaar, Scott & Co., or anybody for them, and was not intended to be delivered, and it was agreed it should not be delivered until said separator did good work and separated the grain from the straw, as it had been recommended and warranted to do; and if the said notes ever came into the hands of Gaar, Scott & Co., plaintiff in this suit, the same were fraudulently obtained by false representations, and without value received, and are not binding instruments as against defendants, and that said notes were obtained from these defendants by the false representations as to said separator, as above set forth.

"And these defendants will further show that sometime on or about the twenty-eighth of October, 1886, the said Gaar, Scott & Co., having been fully informed as to the failure of the separator to do good work, as it was warranted to do, and to separate the grain from the straw as warranted and represented, and the said Garr, Scott & Co. having without any consideration fraudulently and improperly obtained said notes, signed by said defendants, entered into a contract and agreement with the said defendants in writing, by which the said Garr, Scott & Co. agreed, in substance, that if defendants would pay their note of $50, which became due November 1, 1886, the said separator bought by defendants of Garr, Scott & Co. during the season of 1886 should be made to separate the grain from the straw in a perfect manner, as well as any other separator, before they should want to use the same during the season of 1887, and, if said Garr, Scott & Co. failed to do this, they were to take back said separator and refund the notes given for said separator, and that, in consideration of said agreement, these defendants paid said note of $50.

"That the said Garr, Scott & Co. never performed its part of said written agreement, agreed by them to be performed, never did make said separator separate the grain from the straw well, or in a perfect manner, as well as any other machine, and never made nor did they make the same to

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operate in good workman-like manner; and that after said Garr, Scott & Co. had fully failed to make said separator work as agreed by them, said defendants delivered back to said Garr, Scott & Co. said separator, and the same was accepted by said company, * * * and thereupon the contract became rescinded."

The instrument called the note, and the chattel mortgage given to secure the payment of the same, were assigned to the plaintiff before the time of payment named therein. It was shown to be an innocent purchaser for value in the regular course of business.

The instrument is not a negotiable promissory note, as is well settled by our previous decisions. *Lamb v. Story*, 45 Mich. 488 (8 N. W. Rep. 87), 52 Id. 525 (18 N. W. Rep. 248); *Cayuga Co. Nat'l Bank v. Purdy*, 56 Id. 6 (22 N. W. Rep. 93); *First Nat'l Bank v. Carson*, 60 Id. 432 (27 N. W. Rep. 589); *Altman v. Rittershofer*, 68 Id.—— (36 N. W. Rep. 74); *Altman v. Fowler*, 70 Id.—— (37 N. W. Rep. 708). The same defenses were therefore open to the defendants as if the suit had been brought by Gaar, Scott & Co.

The testimony tended to show that the defendants bought and were using the machine upon trial, and the defense set up under the notice was admissible as against the vendors of the machine, and the objections to the introduction of testimony to establish such defense were properly overruled. This disposes of a large number of exceptions to the rulings of the court.

Exception is taken to the ruling of the court in excluding testimony offered to prove that machines made and sold by Gaar, Scott & Co., of the same pattern and size as the one in question, worked well and gave good satisfaction. These witnesses were unacquainted with the machine sold to defendants, and had never seen it work. Such testimony had no tendency to show that this machine was properly constructed and did its work well.

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We have considered all of the errors assigned, and fail to discover any error in the record, and the judgment will be affirmed.

The other Justices concurred.

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THOMAS HOBBS v. THE BRUSH ELECTRIC LIGHT COMPANY.

Negligence—Release of claim for damages—Promise of steady employment for indefinite time—Statute of frauds—Instrument under seal—Consideration—Evidence.

1. A seal imports a consideration, and is *prima facie* evidence of it, but the validity of the instrument may be attacked for fraud, mistake, surprise, duress, or for a *total* want of consideration.
2. The rule created by statute[1] that sealed instruments may be impeached for want of consideration applies with equal force to *all* sealed instruments between party and party.
3. A *verbal* agreement, based upon a good consideration, to furnish steady employment to a discharged employé for no *definite* time, is valid for one year at least.
4. Taking a discharged employé back into service at fixed wages, with a promise of steady employment, is a sufficient consideration for the release by the employé of a claim for damages for injuries received through the negligence of the employer prior to such discharge; and if he is afterwards discharged without cause his remedy is upon said agreement.

Error to Wayne. (Reilly, J.) Argued June 7, 1889. Decided June 28, 1889.

Case for injuries alleged to have been received through the

[1] How. Stat. § 7520.—"In any *action* upon a sealed instrument, and where a *set-off* is founded on any sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed." *Green v. Langdon*, 28 Mich. 226.

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negligence of the defendant. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Henry M. Cheever and *Montgomery & Jeffries*, for appellant.

Marston, Cowles & Jerome, for defendant.

CHAMPLIN, J. The plaintiff was employed by the defendant to trim its lamps, and, while so employed, fell from a pole to the ground, a distance of 25 feet, and was severely injured.

He alleges that the accident was caused by the negligence of the company in not providing a proper guard to sustain him while in the act of cleaning the lamp. This guard was a loop of wire, which was suspended from the top of the lamp frame, and passed around under his arms, and in performing his work this wire was required to sustain nearly the weight of his body. The defect claimed was that this wire was too light, and lacked the requisite strength. He had been in the employment of the company several months in the capacity of trimmer, and had trimmed this lamp, and knew of the unsafe nature and condition of this guard for a long time. It was his duty, under his employment, when he observed any defects in the appliances or apparatus in use by the company, to notify it promptly of such defect. He notified the head trimmer of the unsafe size of this wire guard, and he said he would have it attended to, but it was not done. A few days before the accident he reported it to one of the line men, but nothing was done.

After his injury, which occurred on the seventh day of January, he was taken to the hospital, where he stayed until he recovered sufficiently to walk out, about the middle of March. He went to work again for the company about the twentieth of March, and was employed in the shop for a short time, repairing lamps and cleaning them, when he was set at work again trimming lamps. While he was at the hospital

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the company continued to pay to his wife the same wages he received while at work. They also paid his hospital bills.

The wages and bills so paid amounted to $162.57. After seven or eight days from his injury he knew that his wages were being paid to his wife. He continued to work until the latter part of August, when he took a day off for recreation. When he appeared the next day at the office the superintendent asked him if he had come to quit. He replied "I am here," and he directed Mr. Welton to pay him off, and he did so. He then went and saw Mr. Leggett, the president of the company, and he advised him to go back and talk with the superintendent. After some talk the superintendent told him to come again on Monday. At this time he told plaintiff if he would sign an agreement to clear the company from all responsibility he would give him steady employment as trimmer. He said he paid him his wages while he was sick, and his hospital expenses, and plaintiff told him if he would give him steady work he would sign it.

A release of all actions, causes of action, and damages was then prepared by the company, and plaintiff signed it, because the superintendent said he would give him steady employment at the same wages that he had been having, which was fifteen shillings a day. He worked until the twentieth of October, and was entitled to receive $24.38.

It was the practice of the company to inclose the wages due their employés in an envelope, with the amount marked on the outside, and at the time the envelope was delivered the employé was required to sign a receipt for the amount. The envelope given to the plaintiff was marked $24.38, but on opening it he found it contained $20.38, and a doctor's bill for four dollars. A dispute thereupon arose whether this bill of expense was included in the amount stated in the release, and the company discharged the plaintiff then and there. The plaintiff then brought this action to recover his damages for his personal injuries.

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Upon the trial the facts appeared as stated above. The release, bearing date the tenth day of September, 1888, signed and sealed by the plaintiff, was read in evidence, and the court directed a verdict for the defendant on the ground that there was no testimony showing that the release was obtained by fraud, duress, or surprise.

We agree with the circuit court that there is no evidence of fraud, mistake, surprise, or duress by which the release was executed and delivered. Nor is there any conflict of evidence as to the consideration. The plaintiff's testimony shows the consideration, and it was a good and sufficient one to support the release. The seal imports a consideration, and is *prima facie* evidence of it; but the validity of the instrument may be attacked for fraud, mistake, surprise, duress, or total want of consideration. The rule created by statute that sealed instruments may be impeached for want of consideration applies with equal force to all sealed instruments between party and party. Now, it is claimed by counsel for the plaintiff that there was a total want of consideration, because the payment of plaintiff's wages and hospital expenses by the company was entirely voluntary, and created no debt or obligation against the plaintiff which he was in any wise bound to repay, and the promise to furnish steady employment was void by the statute of frauds because not in writing. It will be noticed that the agreement to furnish steady employment did not specify any time during which it should be furnished, and a verbal promise, based upon a good consideration, would be valid for one year at least.

Grant that the payment of wages and hospital expenses was, in the first instance, voluntary, and could not have been recovered by action, yet there was a consideration for the release in taking the plaintiff, who had been discharged, back into the employment of the company at fixed wages and with the promise of steady employment.

This agreement was legal and binding, and, if the plaintiff

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was discharged without cause, as he appears upon this record to have been, his remedy is upon the agreement. In order to obtain employment by this company he agreed to and did release his cause of action for damages, and the company, in consideration of such release, did take him again into its service, and promise him steady employment at the wages previously paid to him. The settlement appears to have been satisfactory to both parties, and nothing is shown to impeach its validity.

The judgment is affirmed.

The other Justices concurred.

THOMAS O'BRIEN v. BURNETT FULKERSON.

Corporations—Stockholder—Action for personal labor.

A subscriber to the capital stock of a manufacturing company, which never had a stock-transfer book or record, under an agreement with its principal stockholder and president that he would pay for the subscription, which he did, and with the right to take the stock at any time within one year on payment to him in labor of 50 per cent. of its par value, but to whom no certificate of stock was ever issued, and who within three months after so subscribing notified said president that he would not take said stock, to which that officer assented, and said subscriber never acted or was regarded as a stockholder, or received any benefit as such, nor paid anything for the stock, is *not* a stockholder of said corporation.

Error to Kent. (Grove, J.) Argued June 5, 1889. Decided June 28, 1889.

Action to recover for personal labor against a stockholder in a manufacturing corporation. Plaintiff brings error. Affirmed. The facts are stated in the opinion and Reporter's note.

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D. E. Corbitt, for appellant.

More & Wilson, for defendant.

SHERWOOD, C. J. This action is brought by the plaintiff under section 29 of Act No. 232, Laws of 1885, to recover for his personal labor against a stockholder in a manufacturing company organized under the law of 1875 (How. Stat. § 4127, *et seq.*), and located at Newaygo, in this State, and known as the "Newaygo Company."

Said company was organized on the seventh day of July, 1880. The articles of association, which were duly acknowledged, were filed in the office of the Secretary of State, and a duplicate of the same, *unacknowledged*, was also filed in the office of the clerk of Newaygo county.

In these articles the defendant's name appears as one of eight stockholders, who organized the company, and also as a subscriber for 130 shares of the company's stock; the capital stock of the corporation being $100,000, and divided into shares of $25 each. The defendant contends, however, that he never was in fact a stockholder.

The plaintiff, on the nineteenth day of September, 1887, obtained a judgment against the Newaygo Company for $788.55 damages and $21.60 costs. Execution on this judgment was issued, and returned unsatisfied, before this suit was commenced. The labor for which the plaintiff claims was rendered for the company between May, 1881, and November of that year, and from February, 1883, to October, 1884.

The trial was had in the Kent circuit before Judge Grove, without a jury. The judge made a finding of facts, and also found, as questions of law:

"1. That the statute gives no right to bring suit against the stockholders of the Newaygo Company jointly.

"2. That Fulkerson was not a stockholder of the Newaygo Company at the time when its indebtedness to the plaintiff arose, or at any time thereafter."

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The findings of law were excepted to by the plaintiff's counsel. No exceptions, however, were taken to the judge's finding of the facts.

By reason of the plaintiff's discontinuance of his suit against all the persons sued except the defendant, the first finding of law becomes of no importance.

The correctness of the second finding of law depends altogether upon the facts found from the evidence by the court, and, no exception having been taken to such findings, they must be held correct; and from them we are unable to discover how any other judgment could have been given than the one entered by the learned circuit judge, and it must therefore be affirmed.

The course pursued in the case by the plaintiff upon the trial, and the action adopted by him since, renders a discussion of the many interesting questions raised by counsel in their briefs entirely unnecessary, and no opinion is given thereon.

The other Justices concurred.

The following additional facts were found by the trial judge:

1. That defendant became a subscriber under an agreement with the principal stockholder that he would pay the subscription, which he did, and with the right to take the stock at any time within one year on payment to *him* in labor of 50 per cent. of its par value; but no certificate of stock or other evidence of interest in the company was ever issued, nor did the corporation ever have a stock-transfer book or record.

2. That about three months after making such subscription the defendant notified said stockholder, who was president of the corporation, that he would not take said stock, to which that officer assented, and the defendant never acted or was regarded as a stockholder, or received any benefits as such, nor did he ever pay anything for the stock.—REPORTER.

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ANNA M. BARNUM v. MYRENUS TERPENING ET AL.

Vicious animal—Negligence.

1. A wild bull, two and one-half years old, is a dangerous animal to be driven in the street, and in a suit for injuries received from such animal it is for the jury to say whether such driving with the animal's head tied to one foot, after notice that it would be safer to lead him by a ring in his nose, and with knowledge of his wildness and the nature of such an animal, was negligence.
2. The *fact* that a bull has never attacked any one prior to the injury sued for will not bar a recovery, but is a circumstance to be considered by the jury as bearing upon the question of the defendants' negligence.
3. The *fact* that a bull was never actually vicious up to the time of his attack upon the plaintiff, and that the person *then* driving him had no knowledge of such viciousness, will not bar a recovery if the manner of driving and managing the animal was negligent.

Error to Huron. (Beach, J.) Argued June 6 and 7, 1889. Decided June 28, 1889.

Case for injuries received from a vicious bull. Defendants bring error. Affirmed. The facts are stated in the opinion.

Hiram L. Chipman (*Q. A. Smith*, of counsel), for appellants.

John F. Murphy (*Elbridge F. Bacon*, of counsel), for plaintiff.

MORSE, J. The plaintiff recovered a judgment for $400 in the circuit court for the county of Huron in an action on the case for injuries inflicted by a bull belonging to the defendants.

The negligence alleged in the declaration was in *substance* that the bull was wild and vicious, and that it was unsafe

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and improper to drive or permit the said bull to go through any public highway, of all of which the defendants had notice, yet the said defendants wrongfully and negligently drove the said bull through a public highway, etc.

The record shows that the bull was being driven with other cattle along the public highway. The animal's head was tied to one foot. The plaintiff was standing on a bridge that spanned a small stream running through the village of Ubly. She was leaning on the railing talking to her son, who was filling a tank-wagon in the stream. As the bull came along where she was he turned and tossed her over the railing into the stream. She fell upon a cedar stump or root, breaking an arm and a leg.

The defendants claim that the circuit judge should have taken the case from the jury for the reasons—

1. That the bull was not shown to be vicious.
2. That the defendants were not notified of any wild or vicious propensities in the animal, if any there were.
3. That the injury was accidental, and caused wholly by the plaintiff's negligence.

The case was properly submitted to the jury on the question of the plaintiff's negligence, and the injury cannot be said to have been accidental. It may be from the testimony that the plaintiff might have got off from the bridge, and thereby saved herself, if she had tried to do so when she first saw the cattle coming, and it is probable that most women would have done so, but no gross negligence on her part was shown. The injury was not occasioned by any willfulness of the plaintiff in provoking the bull, or going near him, or putting herself in his way, with knowledge of his wildness or viciousness. If the bull had not turned out of his course to assault her, she would not have been injured. See *Brooks v. Taylor*, 65 Mich. 208 (31 N. W. Rep. 837).

The court instructed the jury that, before she could recover, the plaintiff must show that she was not guilty of

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gross negligence or recklessness, which he defined as being conduct on the occasion—

"Not wanting in reasonable care and prudence in view of all the circumstances and surroundings of the injury."

This was certainly as favorable to the defendants as they could ask under the law.

The main objection urged against the verdict and judgment is that the bull was not shown to have been vicious before its attack upon plaintiff, but only that the animal was wild and difficult to drive with the other cattle, which were strange to him; that defendants had purchased the bull but a short time before, and had no notice or knowledge of any viciousness of the animal. The bull was two and one-half years old.

James Clellan, who sold it to defendants, testified that he raised the animal from a calf; that while he owned the bull he never saw or knew of any vicious propensities in the animal. Clellan and hired man drove the bull from his place five miles to Ubly to deliver it to George Andrew. The hired man led the animal. There was no evidence that the bull had ever attacked or attempted to attack any one before the time of the injury to plaintiff, but testimony was given on the part of the plaintiff tending to show that the bull was very wild, and that one Jones, who helped George Andrew get the bull into a barn at Ubly, before and on the day that plaintiff was hurt, told said George Andrew, one of the defendants, that—

"He had best put a ring in his nose, and let one of the men lead him, as he did not want to stay with the other cattle;"—

But Andrew said that—

"He had best tie him down head and foot, and he did so."

We think this was sufficient to go to the jury. A wild bull, two and one-half years old, is certainly a dangerous

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animal to be driven in the street, and the tying, it seems, did not hamper the bull so that he was incapable of doing mischief. It was for the jury to say whether the driving of the bull, under the circumstances, was negligence. The defendants had knowledge of his wildness, and also of the nature of such an animal. They also had notice that it would be safer to lead him.

The fact that the bull had never gored or attacked any one before did not prevent the recovery by the plaintiff for this injury, although it was a circumstance to be taken into consideration by the jury as bearing upon the question of defendants' negligence We think the court correctly instructed the jury that notwithstanding they might find that the animal was not actually vicious up to the time of the injury, and that George Andrew had no knowledge of any viciousness in the bull, yet in view of the known and ordinary propensities of such an animal, if the jury found that the manner of driving and managing the bull was negligent, then the plaintiff could recover, if her conduct on the occasion was not wanting in reasonable care and prudence, in view of all the circumstances and surroundings of the injury.

We find no error in the case, and the judgment of the court below is affirmed.

The other Justices concurred.

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GEORGE LEBLANC, HIGHWAY COMMISSIONER, v. WILHELMINA KRUGER.

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Highways—Order for removal of encroachment—Trespass—Declaration—Description.

1. The intention of How. Stat. § 1373, providing for an action of trespass where an alleged encroachment *upon* or the existence *of* a highway is denied, is to have an exact conformity between the order for removal and the declaration, which pleading is intended to be in writing, and, if verbal, must be equally specific.[1]
2. It is not usual or very safe to have the title to lands settled before a justice of the peace, and, whatever looseness may be tolerated in small controversies, the statute does not allow such important questions as those which relate to farm bounds and highways to be dealt with except in such a way as to leave no room for doubt as to the meaning of the record.

Error to Wayne. (Reilly, J.) Argued June 7, 1889. Decided June 28, 1889.

Trespass for non-removal of encroachment on highway. Defendant brings error. Reversed and a new trial denied. The facts are stated in the opinion.

Henry M. Cheever, for appellant.

Stewart & Galloway, for plaintiff.

CAMPBELL, J. This suit, the names of the parties to which are becoming familiar in this Court, was begun by plaintiff, as highway commissioner, to remove an alleged highway encroachment in Ecorse.[2] The road in question is not one legally set out, but, so far as it exists, is a highway by user only, and is therefore confined to the width actually used by

[1] See *Graham v. Langston*, 65 Mich. 45.
[2] See *Kruger v. LeBlanc*, 62 Mich. 70; 70 Id.—— (37 N. W. Rep. 880).

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the public, and cannot be enlarged without regular proceedings and assessment of damages.

The statute in regard to such proceedings directs the commissioner to make a written order requiring the occupant to remove the encroachment within thirty days, except that fences cannot be required to be moved between the first of April and November, unless made within three months previous to the order. This order is required to specify the width of the road, the greatest extent of the encroachment, and of what it consists, and the place or places where it may be, with reasonable certainty. In case of non-removal and denial of the encroachment or of the highway, an action of trespass must be brought, the declaration in which is to follow the order, and the jury must find the facts as they are shown to exist.

In this case the commissioner's order did not in any way show the width of the road beyond what may be inferred from these words:

"Of the width originally used; that is, in line with Sansouci's and Dasher's fences, which is about fifty feet from the St. Cosme line."

The description of encroachment in the same order is as follows:

"That narrow strip of land along the entire front of said occupant's land, extending thirty-six rods and eight feet along the north side of the said St. Cosme line road, between and in line with the fences of O. Sansouci on the east and Fred Dasher on the west, along the north side of the north ditch of said highway * * * according to the decision of the Supreme Court of Michigan, given April, A. D. 1888."

The declaration, which is a remarkable example of illiteracy, describes, in a method of spelling that we do not feel compelled to follow, the following encroachment:

"On a certain highway in said township known as the 'St. Cosme Line Road,' in front of the premises owned and occu-

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pied by said defendant, by putting up posts and fence-rails in that part of said highway between the premises of O. Sansouci and Fred Dasher, described as follows: 'Beginning at the end of the fence of said O. Sansouci, thence along said highway westerly, in a direct line, to the road fence of Fred Dasher; thence southerly, at right angles to said line, about 30 feet, at right angles to said first-mentioned line; thence easterly, parallel with said mentioned line, to a point, with thence right angle to said last-mentioned line to place of beginning,—the said road being in front of said defendants, being a width of fifty feet thereabouts.'"

This, as far as intelligible at all, describes an encroachment 30 feet wide along the north side of a 50-foot road, the true north boundary of which is a line coincident with the Sansouci and Dasher fences. The order requiring the removal of the encroachment cannot be made intelligible by itself, and does not correspond in terms, or, as far as we can judge, in tenor, with the declaration which is, by statute, required to follow it. How. Stat. § 1373. The order places the encroachment on the north side of the north ditch,—which seems improbable under the testimony,—or else it does not describe it at all. A strip 30 feet wide off from a 50-foot street would hardly be called a "narrow strip," and the declaration makes it exactly 30 feet wide.

The intention of the statute is to have an exact conformity between the order and the declaration. The action is in some respects of a penal nature, and the defendant can only be charged with what is laid against her by the other. It is undoubtedly intended that the declaration shall be in writing, and, if not, the verbal declaration must be equally specific. The principal object of the proceeding is to obtain a finding of record which shall settle the condition and extent of the road and of the encroachment, and the order is the foundation of the suit.

Some questions arise upon other facts of the record, but, inasmuch as the declaration and order do not correspond in describing the road and encroachment with reasonable cer-

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tainty, the whole proceeding must fail, and it is to be hoped if any future steps are taken more care will be had in following the statute. It is not usual or very safe to have the title to lands settled before a justice of the peace, and, whatever looseness may be tolerated in small controversies, the statute does not allow such important questions as those which relate to farm bounds and highways to be dealt with except in such a way as to leave no room for doubt as to the meaning of the record.

The judgment must be reversed *without* granting a new trial, with costs of all the courts.

The other Justices concurred.

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LEROY MOORE AND JAMES TALBERT v. JENS HANSEN.

Justices of the peace—Appeal—Action against indorser—Return—Jurisdiction.

1. Where the return of a justice in an appeal case fails to show any jurisdiction over the defendant, or to set out a cause of action, the defendant, who did not plead below, is not bound to plead or make any defense at the circuit, and any judgment rendered against him is *fatally* defective on error, if not *void* on its face.

   So *held*, where a justice's return to an appeal from a judgment against an indorser undertook to set out a declaration containing no reference to any note on file, nor averment of service of notice of dishonor, and contained no recital of service of process, or of appearance or of default of the defendant, and was not accompanied by any summons or proof of service of summons, or evidence or copy of any note filed with the justice.

2. A defendant, when appealing, has a right to rely upon the justice's return *as made*, and a change therein which vitally alters the situation of the parties cannot be made, except upon a proper application and showing, and an opportunity to be heard on the motion.

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Error to Montcalm. (Smith, J.) Argued June 11, 1889. Decided June 28, 1889.

Assumpsit against an indorser of a promissory note. Defendant brings error. Reversed and new trial denied. The facts are stated in the opinion.

Newell Leonard (*Charles W. Giddings*, of counsel), for appellant.

Ellsworth & Barden, for plaintiffs.

CAMPBELL, J. This suit was brought before a justice of the peace in Montcalm county against defendant, as indorser of a promissory note of Willard Whitmore & Co., dated May 11, 1878, and payable to defendant's order in 30 days, for $292, with interest at 10 per cent. after maturity. The suit was brought on the last day of the sixth year after the note became due, before William N. Relyea, then a justice of the peace, the summons being issued June 13, 1884, and returnable June 24 thereafter. It now appears to have been served June 14, but questions arise concerning this that will be referred to below.

Justice Relyea rendered judgment on the return-day of the summons, defendant not appearing. Defendant appealed within five days, and the appeal papers were returned to the circuit court immediately thereafter. The appeal was not brought to hearing until December, 1888. Defendant did not plead in either court, so for as the record shows. The case was called on for trial by jury in the absence of Mr. Leonard, whose associate, Mr. Hoyt, was unable to procure a postponement by reason of such absence.

Judgment was rendered in the justice's court for exactly $300, there being no remission in form of any balance actually due beyond that sum. In the circuit court judgment was ordered for $433, which was the amount of the judgment before the justice, with interest thereafter on $292. Several

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objections were made to the proceedings, partly jurisdictional and partly of a different character.

The return of the justice undertook to set out a declaration which contained no reference to any note on file, and which did not aver that notice of dishonor had been served on defendant. It contained no recital of service of process, or of appearance or of default of defendant. It was not accompanied by any summons or proof of service of summons, and no evidence or copy of any note filed with the justice.

Standing in this form, defendant was not bound to make any defense, and the case was not only lacking in any evidence of jurisdiction over defendant, but was also defective in setting out no cause of action. Defendant, therefore, was not bound to plead at the circuit, and any judgment rendered on that record would be fatally defective on error, if not void on its face.

After the delay from the summer of 1884 to December, 1888, the case was brought on for hearing. It does not appear who noticed it. No application was ever made for a further return, and when the case was called it stood on a return which gave no jurisdiction, and that objection, having been made when testimony was offered, should have prevailed until, if practicable, the record could be made right. The proof offered in the outset was made by the justice, who, it is claimed, being out of office, had no further powers. Plaintiffs' counsel produced the note with the notary's certificate, and showed it to him, and he swore they were the papers declared on below, and gave a computation of interest. There was no indorsement of any payment of principal or interest. He also swore to the identity of a summons and return showed to him. He was then, against the objection of defendant, who claimed the return showed no jurisdiction, allowed to give testimony concerning what happened before him, and among other things he swore that defendant appeared and applied for an adjournment, which he after-

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wards retracted as incorrect. After some colloquy the court allowed an amended return to be filed, which had been already sworn to by Mr. Relyea, stating that by mistake he had failed to return the summons, and the note and protest filed as plaintiffs' declaration. This completed the proof, and the court ordered judgment.

These proceedings were erroneous. The defendant, when appealing, had a right to rely on the return as made, and upon that he was not bound to take any steps to plead or prepare testimony. The case plainly appeared bad for want of jurisdiction. Whether, after such a lapse of time, the return could be essentially amended, is at least questionable. But there is no doubt that a change in the return, especially one which vitally alters the situation of parties, cannot be made except upon a proper application and showing, and an opportunity to be heard on the motion. The change here made would, if allowed, entitle defendant to plead, which before there was no necessity of doing, as well as to raise any other questions called for. Whether the justice is out of office or not, this amendment was unauthorized, and the verification of it by an *ex parte* affidavit added nothing to its efficacy. The return must be regarded as standing as it did before. Standing thus, there was no jurisdiction to try the cause.

The judgment must be reversed, with costs of all the courts. There is nothing which would authorize a new trial.

The other Justices concurred.

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JOHN H. EAKINS v. THE AMERICAN WHITE BRONZE COMPANY.

Corporations—Organization of company in another state—Authority of directors—Services of officers.

1. In the absence of showing any such power, it cannot be presumed that a Michigan manufacturing company has corporate authority, or that its directors have implied authority, to organize companies in other states, and subject its *home* stockholders to liability for assessments and losses in such enterprises; and certainly individual directors, not acting in any formal way, have no power to employ agents for any such purpose, or to stipulate expressly or impliedly for their compensation.
2. There is no implied power in corporate officers, not having special authority, to bind the company for the services of an employé. *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 329.
3. While it is competent for a corporation to employ and pay a director or officer for *special* work, presumptively services rendered by a director for the *general* benefit are gratuitous, without some preliminary arrangement under which he acts.

Error to Wayne. (Brevoort, J.) Argued June 12, 1889. Decided June 28, 1889.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

E. S. Grece (*E. H. Sellers*, of counsel), for appellant.

Moore & Moore (*John Atkinson*, of counsel), for defendant.

CAMPBELL, J. Plaintiff sued defendant to recover compensation for alleged services in getting up, or helping to get up, a corporation in Iowa to which defendant sold some patterns, and apparently some rights under patents. As the court below took the case from the jury after they failed to agree, it is only necessary to look at the case far enough to

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see whether there was anything to go to the jury. The record is not explicit on some important matters, and fails to show with precision the extent or purpose of some of the principal transactions.

It appears that defendant is a Michigan corporation engaged in making monuments and other articles of a metal called "white bronze," and has some rights on patents which presumably relate to that metal. The articles of incorporation are not set out, and it only appears inferentially that defendant's interest in the patent extended over some other states. Just what it was we do not know.

Plaintiff seems to have had a part in organizing the defendant corporation, and it would appear that in the first instance liberal divisions were made of beneficial interests to get the scheme afloat. Plaintiff was one of the directors. The white bronze business was started in the United States, as he shows, in 1874, and plaintiff was an agent before defendant company was organized, which seems to have been in 1881. In 1884, according to plaintiff's showing, one Oakes had some sort of contract from defendant, and was trying to get up a company in Des Moines, Iowa. Not being immediately successful, plaintiff, Eakins, says he was urged by George W. Moore, the vice-president, and Mr. Stewart, the secretary and treasurer, to go out to Des Moines, and try to get the scheme launched. He went out, and, by the usual methods of persuasion and urgency, succeeded in getting up a company that was to purchase patterns and some other rights from defendant, for which defendant was to have pay partly in money and partly in stock.

There was never any action by the board of directors authorizing plaintiff to act for them, or giving him any powers, or agreeing to pay him for what he did. On his return from Iowa, where he was engaged off and on some three or four weeks, he was given a sum of $1,000, which it is claimed by defendant was not paid as due him by defend-

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ant, but as an acknowledgment of his services. It does not appear that this was voted to him by the directors, but it came from the defendant in some way. He subsequently presented a bill for $5,000, on which he credited the sum of $1,000. The directors refused to recognize any claim, and would not pay him anything more. Offers were made him by defendant to arbitrate, but nothing came of them, and this suit was brought, claiming $10,000, at which rate plaintiff estimated the value of what he did.

The court ruled that he had no legal claim.

It does not appear that any contract relations existed at any time in what plaintiff did. The journey to Iowa was made with a desire on the part of these persons to get up a scheme which would benefit defendant and help themselves as stockholders. It is not testified that even his associates ever promised him pay for services. The only thing looking to plaintiff's remuneration at all is at the end of a letter from Stewart, in which he says:

"You will have your reward for your labor, all in good time."

The most that can be made out of the facts is that the parties were trying to get up something which would be to their mutual advantage, and plaintiff, if it succeeded, might expect liberality. All three of these parties were directors, but they did not profess to act officially, and, had the scheme failed altogether, it does not appear from the record that plaintiff would have had any legal demand against defendant.

In the absence of showing any such power, it cannot be presumed that a Michigan manufacturing company has corporate authority, or that its directors have implied authority, to organize companies in other states, and subject its Michigan stockholders to liability for assessments and losses in such enterprises. And certainly individual directors, not acting in any formal way, have no power to employ agents for any such purpose, or to stipulate expressly or impliedly

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for their compensation. It was held in *Kalamazoo Novelty Co. v. McAlister*, 36 Mich. 327, 329, that there is no implied power in corporate officers, not having special authority, to bind the company for the services of an employé. And it would be a very dangerous doctrine to hold that a director, having no authority to enter upon the furtherance of a scheme beyond the ordinary business, can, merely because it turns out to be profitable, set up a claim for payment for services which in law were voluntary, and not requested or employed. It has been held competent for a corporation to employ and pay a director or officer for special work, but presumptively services rendered by a director for the general benefit are gratuitous, without some preliminary arrangement under which he acts. He may have some excuse for expecting liberality, but he has no demand for pay, enforcible in law, for what was never authorized or requested of him by the corporation. The court below rightly rejected his claim.

The judgment must be affirmed, with costs.

The other Justices concurred.

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DORA RUSSELL v. HENRY RUSSELL.

Petition for maintenance—Allowance.

In this case a weekly allowance to complainant, under Act No. 149, Laws of 1885, is held to be sufficient, and the decree of the court below is affirmed.

Appeal from Wayne. (Hosmer, J.) Argued upon the manuscript record and written briefs, June 19, 1889. Decided June 28, 1889.

Petition for maintenance and support. Complainant appeals from a decree allowing her two dollars per week. Decree affirmed. The facts are stated in the opinion.

James H. Pound, for complainant.

William F. Atkinson, for defendant.

MORSE, J. The parties in this case were married in 1876. In 1880 they separated, and have not lived together since.

In May, 1887, complainant filed her petition in the circuit court for the county of Wayne, in chancery, alleging desertion and non-support, and praying for a decree of a weekly allowance for her maintenance and support.

This petition was filed under Act No. 149, Laws of 1885.

The defendant answered, denying the desertion, and alleging that the separation was forced upon him by his wife.

Upon the pleadings and proofs, Judge Hosmer granted the petition, and decreed that the defendant should pay the complainant two dollars per week from January 7, 1889, on Monday of each week, and $25 solicitor's fees, and the costs of the proceeding to be taxed.

The complainant appealed to this Court, and, upon show-

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ing, we consented to hear the appeal upon the manuscript record and on written briefs. There was no appearance for the defendant on the argument

The statute above cited provides that the circuit judge—

"Shall allot, assign, set apart, and decree to her, as alimony, the use of such part of her husband's real and personal estate, or such proportion of his earnings, income, or revenue, as the court may determine in its discretion," etc.

This act is an amendment to the first section of the law of 1873. How. Stat. §§ 6291–6293.[1] The amendment brings the earnings and the income or revenue of the husband within the power of the court, and authorizes an allotment of a proportion of the same to the support of the wife.

In this case the defendant was shown to have nothing but his monthly earnings as an employé of the fire department, and a few hundred dollars that he had saved from such earnings since the separation. Nothing is shown affecting the health of complainant.

We have examined the testimony and proceedings in the case, and are satisfied that the weekly allowance, under the proofs, is large enough. We are not certain that the husband is any more to blame than is the wife for the existing state of affairs, and we are convinced that a discussion of the details of the marital differences of the parties would not be of any benefit to the profession or the public.

The decree of the court below is affirmed, without costs to either party.

The other Justices concurred.

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[1] See Act No. 90, Laws of 1887, for important changes in act of 1885.

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PETER HUGHES v. THE RECORDER'S COURT OF THE CITY OF DETROIT.

Municipal corporations—Public markets—Ordinances and by-laws.

1. A city has no right, and the city (of Detroit) has never been empowered, to shut out the producers of fresh provisions and similar farm and garden articles from having convenient access to consumers.
2. The amendment to section 11 of chapter 66 of the ordinances of the city of Detroit, adopted April 5, 1889, prohibiting sales of any articles on the Central market except from stalls or stands leased or occupied by the sellers, and confining farmers and gardeners with their vehicles to the Cass and hay markets, is void.
3. The charter of the city of Detroit confers full authority upon the common council to pass and enforce ordinances to prohibit and prevent incumbering of streets, and obstructions to public travel over the streets and public places in the city, by vehicles or otherwise, *outside* of the market limits.

Application for writ of prohibition to restrain proceedings against relator under section 11 of chapter 66 of the ordinances of the city of Detroit, as amended. Heard June 18, 1889. Granted June 28, 1889 The facts are stated in the opinion.

Wisner, Speed & Harvey, for relator.

John W. McGrath, city attorney, for respondent.

CAMPBELL, J. Relator asks a final writ of prohibition to restrain proceedings against him under what he claims to be an illegal ordinance. An order to show cause was made, and the return shows these facts:

Prior to April 15, 1889, by chapter 66 of the city ordinances of Detroit, relating to public markets, the public markets of the city of Detroit were by section 1 defined as including the Cass market, which is a small triangle between

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Adams, Cass, and Grand River avenues, and the Central market, which includes a space 50 feet wide, extending from the Campus Martius to Randolph street, crossed by Bates street. This section remains unchanged, and the Central market is the one referred to in our decision in the case of *Atty. General v. City of Detroit*, 71 Mich.——(38 N. W. Rep. 714), where it was held the city of Detroit could not destroy or impair it.

By section 11 of said chapter it was provided that farmers and gardeners selling and offering for sale from their vehicles the vegetable and other products of their own raising should occupy and stand with such vehicles on the two markets before named, and the eastern and western hay-markets, and by section 12 it was ordained that persons other than farmers and gardeners offering for sale similar articles from their vehicles should occupy and stand at the two hay-markets.

On the fifth of April, 1889, an amendment was adopted to section 11, prohibiting sales of any articles on the Central market except from stalls or stands leased or occupied by the sellers, and confining farmers and gardeners with their vehicles to the Cass and hay markets.

Relator is a gardener who has heretofore sold his produce from his vehicle on the Central market. Having attempted to do so after the passage of the amended ordinance, he was prosecuted in the recorder's court. It appears from the return that a suit is pending in chancery, brought by the Attorney General against the city of Detroit, to enjoin the city from enforcing the ordinance as illegal, and as being within the scope of our former decision on the duty of the city concerning the Central market. The injunction granted seems to have been dissolved, and the city authorities seem to be continuously instituting prosecutions, and not disposed to wait for a determination of the chancery suit.

The direct and only apparent effect of this ordinance as amended is to deprive the producers of market articles of

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their own raising from selling their produce at first hands to consumers in the principal city market, and to compel them to be sold by holders of stalls at second-hand, driving the producers away from the chief seat of market business to remote places, which do not seem to be any more adequate for the accommodation of their vehicles than the Central market.

In the cases of *Henkel v. Detroit*, 49 Mich. 249 (13 N. W. Rep. 611), and *Atty. General v. City of Detroit*, before referred to, the importance of markets as furnishing means of direct communication between purchasers and producers was fully discussed, and this feature was treated as essential to the character of a general market. A city has no right, and the city has never been empowered, to shut out the producers of fresh provisions and similar farm and garden articles from having convenient access to consumers. The return is disingenuous in attempting to conceal the fact that the ordinance does not—as is evidently meant to be understood—merely change the location of sales and not diminish the facilities. But it in fact shuts out farmers and gardeners from the principal market, and gives no substitute for it. The purpose is too obvious to be covered up, and in reading the ordinance before and after amendment it is not even plausibly concealed. The power to prevent and punish forestalling would have nothing to operate on if people who raise their own market products can be dealt with in this way. An essential feature of a market such as we have held the Central market to be cannot be wiped out in this way.

We do not think it worth while to open and rediscuss what has been heretofore fully enough laid down, as often as the obstinacy of city officials persists in subjecting parties to litigation and the city treasury to its expenses. The attempt made to change the ordinance, and, in doing so, to disregard the decisions already made by this Court, cannot be sus-

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tained, and the amendment must be held void. It follows that there can be no prosecution under it. It would be vexatious and unjust in so clear a case, where delay will destroy the season's business, to turn over parties to submission to wrong or to the expense of the multifarious and persecuting prosecutions which it is evident the city officials have been disposed to set in motion. The case is proper for restraint by prohibition, and the order for a writ will be made absolute, with costs against the city.

It may not be out of place to suggest that a decree of this Court is meant to be obeyed.

CHAMPLIN, J. I concur fully in the views expressed by Mr. Justice CAMPBELL. I wish, however, to add that the charter of the city of Detroit confers full authority upon the common council to pass and enforce ordinances to prohibit and prevent the incumbering of streets, and to prevent obstructions to public travel over the streets and public places in the city, by vehicles or otherwise, outside of the market limits.

SHERWOOD, C. J., MORSE, and LONG, JJ., concurred with CHAMPLIN, J.

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PATRICK J. PERROTT, JUSTICE OF THE PEACE, v. CURTIS E. PIERCE, PROSECUTING ATTORNEY.

Constitutional law—Justices of the peace—Municipal courts—Jurisdiction.

It is competent for the Legislature to vest in the police court of a city exclusive jurisdiction to hear, try, and determine all criminal cases triable by a justice of the peace, where the offense charged was committed within the corporate limits of the city.[1]

Application for *mandamus* to compel the prosecuting attorney of Bay county to try an assault and battery case, arising within the corporate limits of Bay City, before a justice of the peace of said city. Submitted June 18, 1889. Denied June 28, 1889. The facts are stated in the opinion.

James Van Kleeck, for relator.

Curtis E. Pierce, in *pro. per.*, for respondent.

SHERWOOD, C. J. The relator is a justice of the peace in Bay City, and asks for a *mandamus* requiring the respondent, the prosecuting attorney of the county, to appear before him in behalf of the people, and conduct a prosecution against a respondent for assault and battery committed within the corporate limits of Bay City.

The respondent denies the right of relator to issue the warrant or to try the case, and insists that he is without jurisdiction to entertain proceedings therein; that the police court has exclusive jurisdiction to hear, try, and determine all criminal cases where the offense charged shall have been committed within the city, and which offense, if committed without the city, would have been within the jurisdiction of

[1] See *People v. Pond*, 67 Mich. 98, and note.

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the justice to try and determine, under the general laws of the State giving the justices jurisdiction.

By section 161 of Act No. 435 of the local acts of the Legislature for the year 1887, the police court of Bay City is given original and exclusive jurisdiction in the class of cases of which assault and battery is one. It is claimed, however, by relator that the jurisdiction of justices of the peace to try criminal cases cannot be divested by the act referred to; that they are conservators of the peace; and that their power to try such cases as the present one appertains to that office, which is a constitutional one.

The jurisdiction of justices of the peace secured by the Constitution is not infringed by this provision of the charter of Bay City transferring the exclusive power to try the criminal cases referred to to the police court of that city. The Legislature is invested with the power to create the police court for the city, and give it such jurisdiction as it may deem proper, and the jurisdiction of a justice of the peace to try criminal cases is derived from no higher authority or source. In both cases it comes from the Legislature, and it may be granted or withheld at the pleasure of the law-making power. Article 6, § 1, Const.

The statute creating the police court of Bay City confines its jurisdiction within its corporate limits, and does not interfere with the power given justices in cases arising in other parts of the county outside of the city, and I am satisfied it is in this respect within the provisions of the Constitution. As was said by Mr. Justice CAMPBELL in *Allor v. Wayne County Auditors*, 43 Mich. 100 (4 N. W. Rep. 492), in speaking of justices of the peace, and their power to try criminal offenses:

"Their power to try criminal offenders is statutory, but it is contemplated by the Constitution that it shall exist to some extent, and the general statutes have extended this jurisdiction to a large class of minor offenses, and it can only be

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restricted by the special municipal criminal jurisdiction in cities."

In this case it has been thus limited, and I have been unable to discover why it may not be done. The police court having the exclusive power to hear and try the case against the respondent therein, it follows that the proceedings before the justice were unwarranted, and the prosecuting attorney was right in not complying with the request of the justice, and the writ must be denied, but without costs.

The other Justices concurred.

HELEN E. TOWN v. LUCIUS H. ARMSTRONG.

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Negligence—Landlord and tenant—Failure to repair—Contributory negligence.

A tenant who, with full knowledge of the dangerous condition of a stairway, which she had not used for over a year, voluntarily attempts to use it for a trivial purpose, cannot recover damages for the injuries sustained, nor will the landlord's failure to keep his promise to repair it warrant such recovery.

Error to Wayne. (Case tried before Judge Chipman, of the superior court, and bill of exceptions settled by Judge Hosmer, of the Wayne circuit court.) Argued June 19, 1889. Decided June 28, 1889.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Larned & Larned (*Reuben Emery*, of counsel), for appellant.

Cutcheon, Crane & Stellwagen, for defendant.

MORSE, J. This is an action of trespass on the case, for

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damages for injuries alleged to have been suffered by plaintiff as tenant of defendant, and through his negligence.

On the twenty-fourth day of May, 1886, the plaintiff, who was occupying with her husband a building at 138 Grand River avenue, in the city of Detroit, belonging to defendant, was in the cellar-way of the building, looking at some canned fruit. She stood on a chair, and reached up to take down a can. In doing so, she dropped the cover of a can into the cellar. She got down off the chair, and attempted to go down into the cellar after the cover, when the stairs gave way, and she fell into the cellar, breaking her ankle, and otherwise injuring herself.

Some serious questions are raised whether she could recover from the defendant in any event, considering the circumstances of her tenancy, but under our view of the case it is not necessary to examine them.

At the close of the testimony, the judge of the superior court of Detroit very properly, as we think, directed a verdict for the defendant.

The plaintiff, from her own showing, was negligent, and grossly so, and cannot therefore recover. She had lived in this building for thirteen years, and was fully acquainted with the condition of the stairway,—knew that it was "rotten and rickety,"—and had not gone down the stairway in over a year. The fact that Armstrong had promised to repair these stairs, and failed to do so, cannot aid her. Her fault was responsible for the accident as well as his, if not more so.

There can be found in the record no excuse which will justify a recovery under the circumstances of her own action. She voluntarily went into a dangerous place, fully aware of the risk she was taking, and using great care in going down the stairs, because she knew that they were unsafe. She took this risk for a can cover. She did not go down to avoid

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a sudden peril, or to prevent great loss or damage. She went for a trifle.

The judgment of the superior court must be affirmed, with costs.

The other Justices concurred.

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THE PEOPLE v. CHARLES WATSON AND HENRY RICE.

Criminal law—Lottery—Conspiracy to obtain money by false pretenses—Common-law offenses.

1. There is no law of this State which prohibits or punishes a person from receiving a prize drawn in a lottery, if it is voluntarily paid to him.
2. Public policy requires that courts should lend active aid in punishing persons who conspire to obtain money or any other valuable thing by means of false pretenses, with intent to cheat or defraud, and in no case should crime be effectually interposed as a shield for crime.
3. A respondent convicted of conspiring to obtain the money of another by means of false pretenses may be sentenced under How. Stat. § 9434, which provides a punishment for the commission of offenses indictable at the common law for the punishment of which no provision is expressly made by any statute of this State.[1]
4. Conspiracy to do an unlawful act was an indictable offense at the common law, and there never was any distinction between conspiracy to commit an act which was unlawful at the common law or one declared to be unlawful by statute, the *conspiracy* being the *gist* of the crime.

Error to recorder's court of the city of Detroit. (Swift, J.)
Argued June 20, 1889. Decided June 28, 1889.

Information for conspiracy to obtain money by means of false pretenses. Respondents were convicted and sentenced

[1] See *Ware v. Branch Circuit Judge*, *ante*, 488.

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to imprisonment in the Detroit House of Correction for two years. Judgment affirmed. The facts are stated in the opinion.

John G. Hawley, for respondents.

James V. D. Willcox, prosecuting attorney, for the People.

CHAMPLIN, J. The respondents were charged with the offense of conspiring to obtain the money of Francis Martin by means of false pretenses.

Capt. Francis Martin was in the eighty-ninth year of his age, and had lived in Detroit about 25 years.

Between 12 and 1 o'clock of the seventh day of December, 1888, he met the defendant Rice at the junction of Washington and Michigan avenues, in Detroit. They entered into conversation. Rice claimed to have just returned from a trip to California, where he had spent the fall and summer with a brother, and was to return there in a few days. This led Capt. Martin to say that he had some acquaintance in California, and asked him if he had been at Los Angeles county, and he said he had. The captain then told him he was in correspondence with a gentleman there whom he named, and Rice told him he knew the gentleman perfectly, and when he went back would inform him of the fact that he had met the captain. Rice then told him that his name was James McMillan, a son of an eminent citizen of that name; and after some further conversation Rice invited him to go to a house with him on Wayne street, where he had some books, and he would like to present the captain with a copy.

They went, and Rice conducted him into a room, and asked Watson if he had received the books. Watson said the books had been received, but they were in a damaged condition, and he sent them back to Chicago to be replaced by perfect copies, and they would be back in a few days. He said he had a history of Michigan written by Bancroft, and

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asked the captain if he would take a copy, and the captain said he certainly would take it. Rice then produced a ticket to the lottery, and handed it to Watson, and asked him what the result of the scheme was, and Watson said he had drawn $50, and paid over $50 in $10 bills. He then took two tickets, and presented one to the captain as a friend of his. He spread them out upon the table, and passed the captain a pack of cards. The combination numbers were 27, and he drew $10,000. Watson then produced packages which had the appearance of money in bills. The upper bill was of the denomination of $50. Watson said they had fairly won the money, but that he was under heavy bonds to his principal in Chicago for $20,000 not to have anything to do with any person other than those who were respectable and responsible, and he said they must first produce $3,000 to show their responsibility and prove their respectability. The captain told him he could not command $3,000 in so short a time,—in the time he gave him to do it,—but that he would get $1,000. Rice said he would go to his father, Mr. McMillan, and get $5,000, and he would loan Capt. Martin $2,000 to produce to Watson, and that with his $1,000 would make the $3,000, and then they could draw the money.

Martin then started for the bank where his money was deposited. Rice accompanied him to the corner of Shelby street and Lafayette avenue, where they agreed to meet in a few minutes, as soon as Rice got his money. Martin went to the bank and asked the proprietor for a thousand dollars which he had on deposit there. Wiser counsels prevailed, and the banker refused to give it to him. He became aware that an attempt was being made to swindle him. It appears that detectives were called in.

Capt. Martin then returned to the corner of Shelby street and Lafayette avenue to meet Rice. He was not there, and did not come. The captain then went to the room on Wayne street, and neither of them were there. Defendants were

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arrested within a couple of hours with the packages and tickets upon their persons. The packages marked $5,000 each were examined, and one contained only $95 and the other $48. Capt. Martin fully identified the packages and tickets. Watson had rented the room, which was a front parlor on the first floor, the day before of Sarah Kirby for two days to write insurance in. Other testimony was introduced.

At the close of the testimony respondents' counsel filed 30 written requests to the court to charge, which were all given in the language of the counsel, except the following, which he declined to give:

"14. It must be in a transaction in which the party defrauded would have the right to engage, if the pretense made to him were true in fact.

"15. The design of the law is to protect those who, for legal purposes, are induced by false and fraudulent representations to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their money.

"16. All gambling, whether by lottery ticket, in money, or any method of money prizes, is unlawful in the State of Michigan."

"30. In this case there is no evidence that tends to show what the respondents intended to do when the prosecutor should exhibit his money, and the jury should render a verdict of not guilty."

The argument of respondents' counsel is that the evidence shows that the complaining witness in the transaction in which it is alleged it was attempted to defraud him was himself engaged in an illegal transaction by attempting to obtain $5,000, which he supposed he had won by lottery gambling. Hence the public are not interested, and he has no right to appeal to the criminal law for protection, and courts will not interfere to protect those who, for unworthy or illegal purposes, part with their money.

To adopt this position would give free license to villains and sharpers to prey upon those who have become credulous through the infirmities of age, or who are unwary from the

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inexperience of youth, as well as a large class who are weak-minded by nature,—the very classes of the community whom it is the policy of the law to protect. Besides, the evidence does not disclose that Capt. Martin was engaged in violating the criminal laws of this State. There is no law of this State which prohibits or punishes a person from receiving a prize drawn in a lottery, if it is voluntarily paid to him. He purchased no ticket, and was not engaged in promoting a lottery scheme.

We have no hesitation in saying that public policy requires that courts should lend active aid in punishing persons who conspire to obtain money or other valuable thing by means of false pretenses, with intent to cheat or defraud, and in no case should crime be effectually interposed as a shield for crime.

We have no doubt whatever that there was sufficient evidence in the case to warrant the verdict of the jury.

It is urged that the sentence imposed is not warranted by the statute. It is claimed that section 9261, How. Stat., covers the offense charged, and that the sentence should not have exceeded imprisonment in the county jail one year, or a fine not exceeding $250, or both such fine and imprisonment.

The court regarded the offense as being governed by section 9434, How. Stat., which provides for the punishment of those—

"Who shall commit any indictable offense at the common law for the punishment of which no provision is expressly made by any statute of this State."

The court was clearly right. Conspiracy to do an unlawful act was an indictable offense at the common law, and there never was any distinction between conspiracy to commit an act which was unlawful at the common law or which is declared to be unlawful by statute. Conspiracy is the gist of the crime.

The judgment must be affirmed.

The other Justices concurred.

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THE PEOPLE v. BURWELL HINCHMAN.

Criminal law—Sale of liquor by a druggist—Information—Evidence—Deposition taken on preliminary examination.

1. An information charging a druggist with the sale of liquor "*as a beverage*" is equivalent to charging that the liquor was sold "*to to be used as a beverage.*"
2. In a prosecution for the illegal sale of liquor, testimony that the party to whom the sale was made was seen on the same day and after such sale with a bottle containing whisky, which he said he obtained of the respondent, is irrelevant to the issue.
3. The deposition of a respondent taken on his preliminary examination, and not claimed *not* to contain *all* of his testimony, is the *best* evidence of what he testified to, and, if in court, is the *only* admissible evidence of that fact.
4. A druggist, acting in good faith in the sale of liquors, has a right to rely explicitly upon the statement made by the purchaser as to the *purpose* for which the liquor is to be applied, unless circumstances or facts known to him show such statement to be false, and are sufficient to satisfy such druggist, acting in good faith and in an honest endeavor to obey the law, that the purpose is not such as stated by the purchaser. The law does not require him to enter into an extended investigation, nor to refuse to sell to a stranger without investigation and proof of the truth of his assertion of such purpose.

Exceptions before judgment from Berrien. (O'Hara, J.) Argued June 20, 1889. Decided June 28, 1889.

Information for the illegal sale of liquor by a druggist. Conviction set aside and new trial granted. The facts are stated in the opinion.

Theo. G. Beaver and *J. J. Van Riper*, for respondent.

S. V. R. Trowbridge, Attorney General, and *George W. Bridgman*, prosecuting attorney, for the People.

CHAMPLIN, J. The information charged Hinchman as follows:

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"That heretofore, to wit, on the seventeenth day of August, in the year one thousand eight hundred and eighty-seven, at the township of Chickaming, in said Berrien county, did sell, furnish, and deliver to one Walter Berger certain spirituous liquors, to wit, one half pint of whisky, as a beverage, he, the said Burwell Hinchman, being then and there a person whose business consisted in part of the sale of drugs and medicines, and said liquors not being then and there sold for medicinal, mechanical, or sacramental purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The counsel for respondent moved to quash the information because it did not set forth any offense mentioned in section 13 of Act No. 259, Laws of 1881, or the amendments thereto, in that it does not show or allege that the said liquors were sold by said Hinchman to be used as a beverage.

The statute prohibits druggists from selling any fermented or spirituous liquor to any person "to be used as a beverage;" and the contention of the counsel for respondent is that, because the words "to be used" are omitted in the information, it fails to charge the offense prohibited; that these words form part of the description of the offense contained in the statute. The question, therefore, is whether the same meaning is conveyed by the charge that Hinchman sold to Berger one half pint of whisky as a beverage that would be conveyed by the charge that Hinchman sold Berger one half pint of whisky to be used as a beverage.

Worcester defines "beverage" as follows: "(1) Liquor to be drank; drink." Webster defines the word as "(1) Liquor for drinking."

If, therefore, Hinchman sold the whisky to Berger as a beverage, he sold it to him to be drank; that is, to be used as a drink. The expression in the information implies the same thing as the language used in the statute, and covers the statutory offense.

Upon the trial in the circuit court, witnesses were permit-

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ted to testify, against objection by counsel for respondent, that they saw Berger the same day after he claims to have procured the liquor from Hinchman, and that he then had a pint bottle with whisky in it, and said he got it of Hinchman. This testimony was irrelevant to the issue, and very prejudicial to the respondent. It did not tend to prove that Hinchman sold the liquor to Berger, and should have been excluded.

The prosecution was also permitted to prove by the complaining witness what Hinchman had sworn to in his examination before the justice who held him for trial at the circuit. Hinchman's examination was taken on oath before the justice, and reduced to writing, and was filed, and was then present in court. The court admitted the testimony of the complaining witness as to what Hinchman testified to as an admission made by him in the case.

This was error. There was no claim made that the written deposition did not contain all the testimony given by defendant on the examination. The written deposition was the best evidence of what Hinchman testified to, and, when it appeared that it was present in court, it was the only admissible evidence of that fact. And it did not cure the error for the prosecutor to say that it was present, and he could read from the deposition if counsel desired. It was sufficient for the counsel to object to the introduction of the improper testimony, and he was not obliged to express his desire to have the deposition read.

The statutory offense consists, in the case of a druggist, in selling the liquors nominated in the statute to be used as a beverage. A druggist has a right to sell for certain purposes. The statute under which the sale was made provided as follows:

"Every such dealer in drugs and medicines shall procure and keep a suitable blank book, in which shall be recorded by said druggist, his clerk or employé, the names of all persons applying for such liquor for any of these lawful purposes, the date of each sale, the amount and kind of liquor sold to

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each person, and the purpose to which the same was to be applied, as stated by the purchaser."

If the druggist acts in good faith in making the sale, he has a right to rely upon the statement made by the purchaser as to the purpose to which the liquor is to be applied; and he has a right to rely upon such statement explicitly, unless circumstances or facts known to the druggist show such statement to be false, and are sufficient to satisfy him, acting in good faith and in an honest endeavor to obey the law, that the purpose is not such as is stated by the purchaser. The law does not require him to enter into an extended investigation, nor to refuse to sell to a stranger without investigation and proof of the truth of the assertion of the purpose by the purchaser. We think the circuit judge placed the respondent under restrictions not required by the law in this respect, and went very much further than the law or the facts of the case authorized or justified.

The portion of the charge referred to is in the following language:

"The law provides that druggists may sell liquors to be used for medicinal, sacramental, or mechanical purposes, but that they shall keep a blank book in which shall be recorded, at the time of the sale, the name of purchaser, the date of sale, the amount and kind of liquor sold, and the purpose to which such liquor was to be applied, as stated by the purchaser; but, gentlemen, the law very wisely provides (and to not so provide would make it a law of which we might well be ashamed) that the purchaser must not only state for what purpose he wants the liquor, but that the druggist must believe that it is intended for such purpose, and he must be led to such belief by reasons that are fair, and such as would lead any ordinary, prudent man to believe the same thing.

"To sell to every man, simply because he represents that it is intended for medicinal, sacramental, or mechanical purposes, is not enough, but you must consider the conversation had, the appearance of the purchaser, and the conduct of both purchaser and druggist at the time of sale.

"It is proper to consider from the testimony whether the appearance of the purchaser was such as to lead the druggist

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to believe that he spoke the truth, whether the defendant druggist was well acquainted or not, whether he did all that a prudent man and one anxious to obey the law would have done; and in this connection I charge you that, if a man who is well known to the druggist as one of truth and veracity should represent to him that he wanted liquor for a lawful purpose, the druggist would be justified in selling to him without further questioning him, if the druggist, by reason of the well-known character of such purchaser, had no reason to disbelieve, and did actually believe, his statement.

"I also charge you that a druggist has a right to sell for such purposes to a stranger, or even to one known to be of not good character, but that, in such case, he must exercise much more caution than in other cases, and from the appearance of such purchaser or purchasers, or from a careful and skillful inquiry of such person,—such an inquiry as a prudent man would naturally make,—be satisfied that such liquor is actually intended to be used for the purpose represented; and if the purchaser be one with whom the druggist is not acquainted,—an entire stranger,—or one with whom he has had but little intercourse, the representations made, the appearance of the purchaser, and his conduct must be respectively strong, and very much in his favor indeed, to warrant a sale of liquor to him.

"The law recognizes that there are medicinal properties in liquor of this kind, and therefore provides for its sale; but it has a right to expect that the greater caution shall be used, and that the drug-store shall not be a curse to the community, as it would be if men were not required to sell at their peril,—unless they exercise the greatest caution in its sale. And—no matter, therefore, to whom it may be sold—gentlemen, if from the quantity ordered, the frequency of purchase, the appearance of the purchaser, or from any other cause, the druggist has the slightest reason to doubt the truth of such representations, if such cause be such as would lead a prudent man engaged in that business to doubt the truth of the statements of such purchaser (it makes no difference how high the standing or how good the character of such purchaser), for a druggist to sell under such circumstances, without satisfying himself that his doubt was groundless, and so satisfying himself, as an honest man would do, to so sell is a violation of the law, and he sells at his peril."

The conviction must be set aside, and a new trial granted.

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MORSE, CAMPBELL, and LONG, JJ., concurred.

SHERWOOD, C. J. I do not think there is any error in the charge of the circuit judge; but, upon the other grounds stated in the opinion, I concur in setting aside the verdict.

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THE PEOPLE v. WILLIAM J. SCHICK.

Criminal law—Return of proceedings to circuit court—Information —Forgery—Evidence—Charge to jury.

1. Where a justice of the peace, before whom a preliminary examination was held, made and entered on his docket all of the findings necessary to confer jurisdiction upon the circuit court if filed with the papers in the case as his return under the statute, a justice to whom such papers and docket are transferred has the right, and it is his legal duty, to certify the same to the circuit court, and an information may be filed thereon.
2. The withdrawal of a former prosecuting attorney from a criminal prosecution after arguing a motion to quash the information and asking a few questions of a witness, even if shown to be in the employ of private persons interested in the prosecution, saves any question under an objection made to his taking part in such prosecution.
3. Where, on a trial of a respondent for forgery, the defense was that the note was drawn by the respondent and delivered to a third party, who returned it, purporting to be signed by the payor by her mark, and that respondent purchased it in good faith; and the payor denied signing the note, and testified that she could write,—it was error to permit her to write her name upon a piece of paper, and allow the prosecution to introduce the paper in evidence, for the purpose, as claimed, of showing that she could write, and that it was not necessary for her to make her mark.[1]
4. It is error for the court in his charge to the jury to assume, as admitted, a controverted fact in the case.

Exceptions before judgment from Mason. (Judkins, J.)
Argued June 20, 1889. Decided June 28, 1889.

[1] See *People v. Parker*, 67 Mich. 222.

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Information for forgery. Respondent was convicted. Verdict set aside and new trial ordered. The facts are stated in the opinion.

M. B. Danaher, for respondent.

Gilbert H. Blodgett, prosecuting attorney, for the People.

LONG, J. A complaint was made in this cause by R. P. Bishop, prosecuting attorney for Mason county, before Levi Shackelton, a justice of the peace, charging respondent with forging and also uttering a forged note, knowing the same to be forged. Warrant was issued thereon, and the respondent brought before the justice, when he waived examination, and was held to trial in the circuit court for that county. Before the papers and proceedings had before the justice were returned to the circuit court the justice died, and his docket and other papers came into the hands of Daniel W. Reardon, another justice of the city of Ludington, who made return to the circuit court of the proceedings had before Justice Shackelton.

The return made was the complaint; warrant; bond given by respondent for his appearance in the circuit court, reciting the fact that respondent appeared before the justice, waived examination, and was held to trial; and a certified copy of the docket entries of Justice Shackelton, showing the proceedings had by and before him, upon which it appeared that the justice certified under his hand that the defendant waived examination in relation to the complaint, and that it was made to appear to the justice that said offense had been committed, and that there was probable cause to believe that the defendant was guilty thereof, and that he therefore required him to enter into a recognizance to appear before the circuit court at the next term thereof. This bond the defendant gave, and it is the one returned.

Upon this return the information was filed, under which respondent was convicted before a jury.

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It is contended that the circuit court had no jurisdiction; that the information was improperly filed; and that Justice Reardon had no authority to return the proceedings had before another justice. There is no claim made but that Reardon was a justice, and had the lawful custody of these files and proceedings.

There was no error in this. The justice before whom the proceedings were had made all the findings necessary to confer jurisdiction upon the circuit court, namely, that upon the complaint and warrant the defendant appeared before him, waived examination, and that upon the proceedings had before him he had determined that an offense had been committed, and that there was probable cause to believe the defendant guilty thereof. These facts were found and certified by Justice Shackelton under his hand. This was the judicial determination required by the statute, and Justice Reardon, under the statute, having the legal custody of these papers and proceedings, had the authority to certify them to the circuit court. It did not matter that this certificate and finding of the former justice appeared upon his docket. While it may be true that the statute does not require a justice of the peace to keep a docket in criminal cases which are beyond his jurisdiction to try and determine, yet the certificate and finding made in the present case by the former justice was as full and complete as required by the statute of the justice in certifying the cause to the circuit court. If, instead of entering this finding on his docket, Justice Shackelton had made and filed it in the circuit court, it would have met all the requirements of the statute.

Under the circumstances, Justice Reardon had the right, and it became his duty, to certify these papers and proceedings to the circuit court, and upon which the information was properly filed.

At the time the cause came on for trial in the circuit court the term of office of R. P. Bishop, as prosecuting attorney,

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had expired, but he entered upon the trial of the cause as assistant to the then prosecuting attorney. Defendant's counsel objected to Mr. Bishop's appearing as prosecutor, for the reason that he was the complaining witness in the case; and also that he took the note for collection, and attempted to collect it from the defendant; and also on the ground that he is the general attorney for the party whom it is alleged in the information the defendant attempted to defraud.

Mr. Bishop, upon being interrogated thereto, denied these charges, and also stated that he appeared by request of the prosecuting attorney, and under an arrangement made with the board of supervisors. He admitted that he had had the note, and told the defendant if he paid it to Mr. Hengstler before prosecution was commenced he would consider the matter.

The court overruled the motion, and permitted Mr. Bishop to remain in the case for the prosecution, and Mr. Bishop then appeared, and argued the motion to quash the information, and also asked a few questions of one of the witnesses produced on the trial, when he withdrew from the cause as one of the prosecutors, and took no further part as such therein. He was afterwards called as a witness for the prosecution.

It is true that counsel in the employ of private parties interested in the prosecution are not allowed to prosecute in criminal causes, but this is not made to appear, and, even if it were, what Mr. Bishop did in this case we do not think in any manner tended to prejudice the defense, and his withdrawal at this stage of the proceedings from the case saves any question.

Some question is raised that there was a variance between the note described in the information and the note offered in evidence. This objection relates to an erasure appearing

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upon the back of the note, which was not set out in the description of the note in the information.

We do not think this objection has any force, and it will not be further considered.

The note in controversy reads as follows:

"No. ———. LUDINGTON, Jan. 19, 1887.

"One year after date I promise to pay to the order of Wm. J. Schick one hundred and ten dollars, value received, with interest at ten per cent. per annum.

"Due———. MARY her X mark HUNTLEY.

"$110.00."

Mrs. Mary Huntley was called as a witness by the prosecution, and testified that in January, 1888, was the first she ever saw the note, or knew that such a note was in existence; that she can read and write; and that it was not her signature to the note. Witness was then asked by the prosecution to write her name upon a piece of paper, which she did. This piece of paper, with her signature thereon, was then offered in evidence by the prosecution, for the purpose, as was claimed, to show that she could write, and that it was not necessary, therefore, for her to sign by mark. Under objection of counsel for defendant, the court permitted this to be put in evidence to show that witness could write. If this was the only effect such paper might have upon the case, no error would have been committed, but its effect upon the minds of the jury might not necessarily be limited to that fact.

The claim made by the defendant was that a man by the name of Purdy, who was owing him a balance of some $60 on a deal had between them some time before, came to him and wanted him to buy a note against the Huntleys, which he was about to get in a deal with them; that he, the defendant, drew the note in controversy here, which Purdy took away, and that in about a week he returned it, signed by Mrs.

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Huntley by her mark, and defendant paid him for it, paying the difference between the $60 which Purdy owed him and the face of the note. Defendant claims that some two weeks after that he sold the note to Andrew Hengstler, indorsing it without recourse to him.

John Schick, a brother of the defendant, testified in his behalf that he loaned his brother, the defendant, $20, which was used in the purchase of the note from Purdy, and that he saw Purdy let his brother have a note of $110, and he thought this was the note.

Mr. Edward Bogan also gave testimony tending to show that the defendant purchased the note from Purdy, and paid him for it, as defendant claimed. Several witnesses were also called by defendant, and gave testimony that the name of Mary Huntley, written on the note, was not in the handwriting of the defendant.

The people introduced testimony by Mr. Hengstler tending to show that when the defendant sold the note to him he stated to him that he sold a horse to Mrs. Huntley, and she was not satisfied with it, when he sent her another horse, and received the note in controversy; that Mrs. Huntley could not write or read, and had to make a mark, and that a man was along who took the horse, and was a witness to the mark; that Mr. Purdy took the horse down to her, and brought the note back to him; that Purdy saw her make the mark. This witness did not seem to remember much about the words "without recourse," which were erased from the back of the note under the signature of the defendant, but thought they were there when he took the note.

Mrs. Huntley was called as a witness by the prosecution, and testified that it was not her signature to the note, and that she could read and write.

She testified that she saw the defendant at her place sometime in May, 1886, when he came there with a note signed by her husband, which he had given to Mr. Purdy; that defend-

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ant wanted her to sign this note, which she refused to do; and that the second time he came, in November or December, he took a horse away from her husband, for which the note was given to Mr. Purdy, and returned the note to her husband when he took the horse; that Mr. Purdy was there with him the first time; and that she never had any other dealings with the defendant.

Mr. Bishop, the late prosecuting attorney, was called, and testified that he called the defendant into his office, and talked with him about this note, when the defendant told him he received it from Purdy, and that he learned from Purdy that Mrs. Huntley could not read or write; that afterwards the defendant came to him, and wanted to pay the note and fix it up, and said if a warrant was served he would kill himself; that he offered to pay the note, and pay the witness well if he would let him fix it up.

Richard Purdy was also called, and testified that he did not take the note from Mrs. Huntley, and did not let the defendant have it; that he never saw the note until long after the time the defendant claims to have received it from him.

Some testimony was also given by the prosecution tending to show that the signature to the note was in the same handwriting as the body of the note.

It was under these circumstances that Mrs. Huntley was asked to write her name, and such signature was put in evidence by the prosecution by permission of the court, under the defendant's objection.

As before stated, the court permitted it for the purpose of showing that Mrs. Huntley could write. While it was competent to show that Mrs. Huntley could write, it was wholly incompetent to receive her signature in evidence so made, and might have had a strong bearing against the defendant in the minds of the jury. The claim of the people was that the defendant not only uttered the note knowing it to be forged, but also that he was guilty of the forgery; and testi-

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mony was given tending to show that the signature was in the same handwriting as the body of the note, which the defendant conceded was his.

The defense set up was that the note was drawn by the defendant, taken away by Purdy, and returned by him to the defendant, purporting to be signed by Mrs. Huntley by her mark; and that defendant bought it in good faith, believing that Mrs. Huntley did sign it, and in reliance upon what Purdy said.

It was not conceded that Mrs. Huntley did not sign the note, or mak her mark thereto, but it was claimed that Purdy brought the note with such signature and mark to the defendant, who took it in good faith.

The issu was thus made, and under the testimony it was for the jury to say whether this was so. The whole matter rested between Purdy and the defendant, with the other testimony and circumstances surrounding the case to aid the jury in their determination, and it was prejudicial to the defendant to permit the signature of Mrs. Huntley, made there on the trial, to be taken and weighed by the jury in determining the question.

One other question remains. The court in its charge stated to the jury, among other matters:

"If Mary Huntley never signed this note, or authorized the signature, and I believe that is conceded here, she has taken the stand and testified that she never signed it, and never authorized Purdy or Schick, or any one else to sign it," etc.

This was error. It was not so conceded. The fact that defendant claimed not to know who did sign Mrs. Huntley's name to the note, and that Purdy brought the note to him signed, is not a concession that Mrs. Huntley did not sign it.

This was one of the facts to be established by the prosecution by proofs, and whether it was so established was a question of fact for the jury.

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The balance of the charge was very fair to the defendant.

The case comes here on exceptions before sentence.

The verdict must be set aside for the errors pointed out, and a new trial ordered.

The other Justices concurred.

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ISAAC PENNINGTON v. JOHN B. PENNINGTON.

Deed—Delivery—Rescission.

1. Until a deed is delivered to the grantee to become *presently* operative, the grantor retains the right to rescind or recall it.
2. In this case the Court find that the deed was legally recalled, and decree its cancellation.

Appeal from Clinton. (Smith, J.) Argued June 21, 1889. Decided June 28, 1889.

Bill filed for the cancellation and removal from record of a deed. Complainant appeals. Decree reversed, and one entered granting relief prayed for. The facts are stated in the opinion.

H. E. Walbridge and *L. W. Hill* (*H. F. Pennington*, of counsel), for complainant.

O. L. Spaulding and *H. J. Patterson*, for defendant.

CAMPBELL, J. Isaac Pennington, the original complainant, who has died since the appeal, filed his bill for the cancellation and removal from record of a deed to the defendant, which was executed August 12, 1887, and deposited for safe keeping with Ezekiel Niles, and not to be delivered during complainant's life. Whether to be delivered then, at all events, is disputed. About November 1, 1887, defendant

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procured an order from complainant to Niles to let him have the deed, and it was delivered to defendant, who recorded it. Complainant claimed that the order was given in order that the deed should be taken to complainant, so that arrangements might be made for taking from defendant security to make some provisions for other heirs, which complainant intended to require of him as a condition for letting him have the title, the whole arrangement to take place after complainant's death.

Defendant, in his answer, says that complainant requested defendant to advance him certain money to the amount of about $1,000, and defendant objected to doing so unless the deed was put on record, which complainant consented to, and defendant claims he has always been ready to carry out this verbal agreement. The court below made a decree, which is not in harmony with the claim or testimony of either party, by canceling the record and ordering the deed to be delivered to Niles, to be held till complainant's death, leaving complainant and his wife possession for life, and setting the deed aside altogether as to the homestead, which was embraced with the other property.

The testimony of complainant and Philo Doty, who received all his instructions, and on whose advice complainant conceived the scheme of making deeds operative in future, is full and consistent that it was understood the arrangement did not contemplate that Niles should hold the papers except subject to complainant's right to rescind or alter them at pleasure. Two other deeds were held under the same arrangement. Mr. Niles, who drew the papers in an adjacent room, and did not hear all the conversation, received no instructions as to the terms of delivery after complainant's death, but testifies distinctly that he understood he held them subject to complainant's order, and, on a motion for leave to take further testimony, he made a positive affidavit to the same effect. It appears further that

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complainant did not mean at that time to have it known that any such steps had been taken. The fact got out, as such facts are apt to do, by the inquisitiveness or the lack of discretion of some one who should have been more silent. As the only persons who knew anything of the matter agree entirely in their account, which is reasonable and probable in itself, with nothing to contradict it, we have no doubt that the deposit with Niles was never meant to be final.

It is equally clear to us that complainant was only led to having the deed handed to defendant for the purpose of showing defendant what was intended, and to induce him to make the papers to secure certain money to the other heirs, upon securing which the deed would be allowed to become operative at complainant's death. Defendant's story is that he was to have the deed at once, to be operative at once, without even security that he would advance such moneys as complainant might wish to the extent of $1,000. The story is all the more improbable, because it does not seem to have occurred to any of the parties that the homestead would not pass with the rest, and no doubt the fact that the estate covered by the deed was, if conveyed, of very considerable value, made it proper and desirable to compel defendant to make a provision larger than would have been otherwise to be expected. And it is contrary to all good sense to suppose that complainant meant to turn himself and wife out of doors and give defendant full rights, as he would have had by an absolute delivery without conditions.

Unless the complainant made a delivery to defendant to become presently operative, the deed was never delivered to him at all, and the complainant retained the right to recall or rescind it, which he has exercised. What he might have done had defendant done his duty in carrying the deed to him instead of recording it, we need not inquire. In our opinion, the deed was legally recalled, and became inoperative.

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The decree below should be reversed, and a decree entered canceling it altogether, with costs against defendant.

The other Justices concurred.

THE VILLAGE OF NORTHVILLE v. OLIVER WESTFALL.

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Criminal law—Violation of municipal ordinance—Right of appeal.

The acquittal of a defendant, prosecuted by complaint and warrant as in a criminal proceeding, for the violation of a village ordinance, pursuant to the general law of this State for the incorporation of villages, is beyond reach by any process of review.

Error to Wayne. (Brevoort, J.) Argued June 5, 1888. Decided July 11, 1889.

Defendant was prosecuted for the violation of a village ordinance, and acquitted. Plaintiff brings error. Acquittal held a bar to any process of review. The facts are stated in the opinion.

H. E. Spalding (*C. I. Walker*, of counsel), for appellant.

Samuel W. Burroughs, for defendant.

LONG, J. The defendant was arrested, tried, and convicted on September 20, 1887, before a justice of the peace and a jury, upon a complaint and warrant charging him with unlawfully keeping and maintaining a saloon in said village of Northville, and with having, on August 10, 1887, sold intoxicating liquors to divers persons there, in violation of ordinance No. 29, relating to the suppression of saloons. The ordinance referred to provides—

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"That on and after the first day of May, A. D. 1887, all saloons for the sale of spirituous and intoxicating liquors in the village of Northville shall be prohibited and suppressed; that any person who shall keep or open a saloon for the sale of spirituous or intoxicating liquors shall be guilty of a misdemeanor, and shall be punishable by a fine of not less than twenty-five dollars, nor more than one hundred dollars, or by imprisonment of not less than ten days, nor more than ninety days, or by both such fine and imprisonment, in the discretion of the court, together with the costs of prosecution for such violation of the ordinance:

Provided, that, should any offender fail to pay such fine or penalty as may be imposed, such person may be imprisoned for any time, not to exceed ninety days, unless payment thereof sooner be made."

Upon conviction the justice adjudged the defendant should pay a fine of $35 and the costs of prosecution, by four o'clock in the afternoon of September 21, 1887, and in default thereof be imprisoned in the Detroit House of Correction for the term of 30 days, unless such fine and costs were sooner paid. From this conviction and judgment the defendant appealed to the circuit court for Wayne county.

On the trial in the circuit court it appeared that the defendant kept and maintained a saloon in said village on the day set out in the complaint and warrant, and that he did on that day sell spirituous and intoxicating liquors to various persons.

On the part of defendant it was claimed, and the court permitted the facts to be shown, that the defendant, before the time of such sales, made and executed the bond required by the statutes of the State of persons engaging in the sale of intoxicating liquors, in the penalty of $6,000, with two sufficient sureties, and presented the same to the village council for approval, but that the council refused to approve such bond for the sole reason that the ordinance prohibited the sale of liquors in the village. Upon the bond being presented to the council for approval, the village clerk was directed to and did indorse thereon the following:

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"At a regular meeting of the village council held Tuesday evening, May 24, 1887, a motion prevailed that the within bond be rejected, on the ground that there is an ordinance that prohibits and suppresses the sale of liquors in saloons in said village," etc.

It also appeared that on May 2, 1887, the defendant paid to the county treasurer of Wayne county $300, the amount of the tax required under the provisions of the statute, of all persons engaging in the sale of spirituous and intoxicating liquors, and that thereafter such moneys were paid by the county treasurer over to the village of Northville.

Upon the close of the testimony the village, by its counsel, requested the court to instruct the jury as follows:

"If the jury believe the evidence on behalf of the prosecution, they must find the defendant guilty."

This request the court refused to give, but stated to the jury that he left the whole case to them, under the circumstances, as a question of fact, to say whether the defendant was guilty or not, but stating to counsel, in presence of the jury, that, if he had been requested by counsel for the defendant, he would not let the case go to the jury.

The contention of the counsel for the defendant, first, is that the ordinance is invalid, as its effect is to suspend the operation of the State law, giving every person the right to sell liquors upon payment of the tax and giving the requisite bond. From the view we take of the case upon the acquittal, this question does not become important, and we therefore express no opinion upon that branch of the case.

Under the general act for the incorporation of villages, however, as amended in 1883 (Act No. 52, Laws of 1883), every village subject to the provisions of the act, in addition to the other powers conferred, is empowered—

"To suppress saloons for the sale of spirituous and intoxicating liquors."

This is an amendment of Act No. 62 of the Laws of 1875,

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granting and defining the powers and duties of incorporated villages. This act was amended by Act No. 245, Laws of 1879. Section 2, chap. 6, of this act, provides:

"When, by the provisions of this act, the council of any village has authority to pass ordinances for any purpose, they may prescribe fines, penalties, and forfeitures not exceeding one hundred dollars, unless a greater fine or penalty is herein authorized, or imprisonment not exceeding ninety days, or both, in the discretion of the court, together with the costs of the prosecution, for each violation of any of said ordinances, and may provide that the offender, on failing to pay such fine, penalty, or forfeiture, and the costs of prosecution, may be imprisoned for any time not exceeding ninety days, unless payment thereof be sooner made, and also that the offender be kept at labor during such imprisonment. Such fine, penalty, or forfeiture and imprisonment, for the violation of any ordinance, shall be prescribed in the ordinance; and, if imprisonment be adjudged in any case, it may be in the village prison, or in the county jail of the county in which the village is located, or in any other place of confinement provided by the village for such purpose, in the discretion of the court."

Section 7 of the act provides:

"Whenever a penalty shall be incurred for the violation of any ordinance, and no provision shall be made for the imprisonment of the offender upon conviction thereof, such penalty may be recovered in an action of debt or in assumpsit."

It is also provided by this section that prosecutions, except as against corporations, be commenced by warrant, and that proceedings relating to the arrest and custody of the accused during the pendency of the suit, and the pleadings and all proceedings upon the trial of the cause, and in procuring the attendance and testimony of witnesses, and in the rendition of judgments, and the execution thereof, except as otherwise provided by the act, be governed by and conform as nearly as may be to the provisions of law regulating the proceedings in criminal causes cognizable by justices of the peace.

It is provided that in suits commenced by warrant the jury, which is provided for in the act, shall be selected and

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summoned as in criminal cases cognizable by justices of the peace. The warrant shall be in the name of the people of the State of Michigan, and set forth the substance of the offense complained of, and be substantially of the form, and be issued upon complaint made, as provided by law in criminal cases cognizable by justices of the peace.

The proceedings in this case were had in substantial compliance with the provisions of these acts.

The only remedy at the common law for the recovery of penalties attached to a violation of municipal ordinances was an action in the nature of debt, and by section 7 of this act such action is preserved when no provision is made for the imprisonment of the offender upon conviction. In the present case the statute provides for such imprisonment as for a misdemeanor. The punishment is by fine or imprisonment, or both, in the discretion of the court.

The only means provided for the enforcement of the ordinance is by complaint and warrant as in criminal cases cognizable by justices of the peace, and the punishment prescribed by the ordinance, upon conviction, is fine or imprisonment, or both, in the discretion of the court. The defendant was acquitted upon a trial on the merits in the circuit court.

There can be no doubt that in an action authorized to be commenced by summons or by civil warrant for the collection of penalties, and which is so prosecuted, in the nature of an action for debt, the case would be entirely a civil action, and the municipality as well as the defendant would be entitled to all the rights of appeal and retrial, as other parties in civil actions. But the prosecution in the present case has proceeded entirely by complaint and warrant as in criminal cases, and upon which the defendant was arrested, and by the provisions of the ordinance, and the statute under which the prosecution was had, could have been imprisoned in the common jail of the county for a term not exceeding 90 days.

It is claimed that imprisonment in such cases is not by way

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of punishment as for a crime or misdemeanor, but simply for the enforcement of the penalty. Yet the statute authorizes and the ordinance provides for imprisonment as well as fine, or both, in the discretion of the court; and upon a conviction the offender may suffer as long a term of imprisonment, as well as adjudged to pay a fine, as in any case of misdemeanor cognizable by a justice of the peace that is criminal in its nature.

It is true that the proceedings for the enforcement of ordinances have always been regarded as civil actions, but where, under the statute, the enforcement is sought by a resort to proceedings which are carried forward in all respects as criminal cases are prosecuted, by complaint and warrant, and where the court is authorized to inflict upon the offender not only the fine, and imprisonment for its non-payment, but also imprisonment aside from a pecuniary fine, I have no doubt that upon a trial on the merits the offender has been as much in jeopardy, within the meaning of that term, as though the proceedings were strictly criminal.

The doctrine is older than our constitutions, that—

"No man is to be brought into jeopardy of his life more than once for the same offense."

The Constitution of the United States provides that—

"No person shall be subject for the same offense to be twice put in jeopardy of life or limb."

This doctrine has been applied by the courts to misdemeanors as well as to felonies. This doctrine has not been applied to actions brought for the recovery of penalties, where such actions are civil in form. But I am not aware of any ruling by the courts in this country holding that this maxim is not applicable to all cases where one may be deprived of his liberty in an action, though for the enforcement of penalties and forfeitures, prosecuted in the form of criminal causes, and where the punishment to be inflicted is imprisonment as

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well as a fine, in the discretion of the court. If this doctrine is not to be upheld, then it must necessarily follow that in all prosecutions for the enforcement of penalties and forfeitures the court has no power to imprison, except as an alternative for non-payment of the fine imposed.

Section 29, Art. 6, of the Constitution of this State, provides that—

"No person, after acquittal upon the merits, shall be tried for the same offense."

The defendant has been tried for an offense in a proceeding prosecuted in all respects like a criminal cause, and under an ordinance providing for an imprisonment, not only for non-payment of a fine, but imprisonment in the discretion of the court, without regard to the fine.

In municipal government, no less than in more general government, it is the power of the State that acts upon the citizen. The State herself, in her own direct prosecutions, is prohibited by this clause in the Constitution from harrassing the citizen after an acquittal upon the merits, and it cannot be said that the State can delegate a greater power than she herself possesses, and no such thing is attempted by this statute.

It cannot matter, so far as the rights of the village are concerned, how the acquittal of the defendant was procured; whether upon a fair submission of the case to the jury, or by the direction of the court; the facts appear that there has been a trial of the case upon the merits.

An acquittal was procured, and municipalities as well as the State must acquiesce in judgments of discharge rendered upon verdicts found in a trial upon the merits, under such powers as are conferred by this statute. No new trial can be granted.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred.

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CAMPBELL, J. The village of Northville prosecuted defendant under an ordinance against saloon keeping, not in civil form to recover a pecuniary penalty, but on the claim that he might be subjected to punishment, and the justice before whom he was tried gave judgment involving a fine and imprisonment. Upon appeal to the circuit court, defendant was acquitted by a jury. The village has undertaken to bring the case here for review. Defendant claims the acquittal was final. If this is so, there is no case here calling for any further discussion.

The statute under which the village prosecuted provides that where a prosecution of this sort is attempted it shall be in accordance with criminal proceedings before justices of the peace, and must conform to them. This course, whether legally objectionable or not, was adopted. It necessarily follows that appellate proceedings to review the matters thus prosecuted must conform also. There is no right of appeal given to the prosecutor after acquittal in any criminal case, and, as this case has adopted the criminal methods of accusation and trial, it must be governed by the same rules, and the acquittal must be held beyond reach by any process of review. It would therefore be useless to consider questions which on this record we cannot decide, and which, if we could decide them, involve many inquiries that would require much consideration and thorough discussion that in the present case would be theoretical and unsatisfactory.

The proceedings cannot be disturbed, and the judgment of acquittal should be affirmed, with costs.

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THE PEOPLE v. DANIEL HANRAHAN.

Criminal law—Municipal corporations—By-laws and ordinances—Statutes—Repeal—Constitutional law.

1. Act No. 84, Laws of 1887, making the offense of keeping a house of ill fame a felony, and punishable as such, does not repeal by implication the provision of the charter of the city of Detroit authorizing the common council to prohibit, prevent, and suppress the keeping of such houses.

2. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN:

a—The constitutional provisions relating to laws passed by the Legislature do not apply to ordinances enacted by the common council of a city.

b—The Legislature has the constitutional power to confer upon the common council of a city authority to prohibit, prevent, and suppress the keeping and leasing of houses of ill fame, and to restrain, suppress, and punish the keepers thereof, and the owners and lessors of such premises.

c—The Legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense, and be punished as a felony, although such acts, if committed in another locality or section of the State, would not be a criminal act at all.

d—To declare *what* shall constitute a crime, and how it shall be punished, is an exercise of the soverign power of a state, inherent in the legislative department of the government, and, unless authorized by the constitution, this power cannot be delegated to any other body or agency.

e—The general criminal laws of the State are in force in every part thereof, and none but the enacting power can suspend or repeal them.

f—The Constitution has granted to the Legislature authority to *delegate* to a city or village the right to enact by-laws and ordinances to prevent vice and immorality, and for the enforcement of good order within the limits of the corporation, and for numerous other purposes affecting the health and welfare of its people; and, acting under this authority, the Legislature has conferred power upon the municipalities to *enforce* the observance of these ordinances by fine or imprisonment, or both.

g—The word "crime" is applicable to both a "felony" and

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"misdemeanor," and the words "offense" and "crime" are synonymous, when applied to convictions for violations of statutes of a *public* nature, and said words are used interchangeably in our compilations.

h—Whenever a person does an act which is prohibited by law, and is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime.

i—An ordinance, validly enacted, prohibiting certain acts under fines, penalties, or imprisonment, is, within the jurisdiction of the municipality enacting it, as much entitled to respectable obedience, and is as much the law of the land for that locality, as a law enacted by the Legislature; and a person violating it commits an offense, and in one sense a crime, for which he may be sentenced, if under the authority of a statute the ordinance so provides, to imprisonment at hard labor.

j—It rests in the sound discretion of the Legislature to determine to what extent they will give to municipal courts authority to punish offenders; but whatever authority is delegated to these bodies to legislate upon the subject of offenses, and to prescribe within certain limits the punishment to be inflicted therefor, the constitutional rights of the accused must be protected and preserved in everything that is done, as fully as if the prosecution was for a crime under the *general* law of the State.

k—Hard labor, in itself, is not infamous or degrading, but ennobling, and is the foundation upon which reposes all true progress in mental and moral development.

> "An angel's wing would droop if long at rest,
> And God himself, inactive, were no longer blest."

The infamy and degradation consist in its being *involuntary*. The distinction is the difference between liberty and slavery.

l—Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statute. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative, or cumulative, or auxiliary, and not inconsistent, both must stand.

8. After an exhaustive discussion of the question of the *effect* of the passage of a statute general in its terms, provisions, and application upon a *local* statute providing for a particular case or class of cases, the following conclusions are reached:

a—The *local* act may be exclusive of the general law, and operate to repeal it by implication; as when its provisions are repugnant to or inconsistent with the general law, in which case there can be no prosecution except it be under it.

b—Both laws may be *concurrent*, as where there is no repugnance, or where one is merely auxiliary or cumulative to the other, in which case prosecutions may be instituted under *either*

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law, and the court that *first* acquires jurisdiction over the person of the accused has *exclusive* jurisdiction to hear, try, and determine the case, and a conviction for an offense which is the same in both laws will be a bar to a prosecution for the same offense under the *other* law.

Certiorari to recorder's court of the city of Detroit. (William Look, one of the judges of the Wayne circuit court, presiding at the request of Recorder Swift.) Argued January 27, 1888, and reargued on a rehearing May 15, 1888. Decided July 11, 1889.

Respondent was convicted, on his plea of guilty, in the recorder's court of the city of Detroit, under an ordinance of said city, of keeping a house of ill fame, and sentenced to pay a fine of $500 *forthwith*, and, in default thereof, to be committed to the Detroit House of Correction until payment of said fine, not exceeding six months, which sentence was affirmed in the Supreme Court. The facts are stated in the opinion.

James H. Pound, for respondent.

George F. Robison, prosecuting attorney, and *John W. McGrath*, city counselor, for the People.

CHAMPLIN, J. For many years prior to 1887 there existed a statute relating to offenses against chastity, morality, and decency, which reads as follows:

"Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars." How. Stat. § 9286.

At the session of the Legislature in 1887 this section was amended by Act No. 34, so as to read as follows:

"Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, and every person who shall solicit, or in any manner induce, a female to enter such house for the purpose of becoming a prostitute,

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or shall by force, fraud, deceit, or in any like manner procure a female to enter such house for the purpose of prostitution or of becoming a prostitute, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the State prison not more than five years, or in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court."

The charter granted by the Legislature to the city of Detroit in 1883, among other provisions, contained the following provision:

"The common council may prohibit, prevent, and suppress the keeping and leasing of houses of ill fame or assignation or for the resort of common prostitutes, disorderly houses, and disorderly groceries. It may restrain, suppress, and punish the keepers thereof, and the owners and lessors of such premises." Local Acts of 1883, chap. 7, § 47, p. 611.

Section 54 of the same chapter provides that—

"The common council shall have power to provide for the imprisonment and confinement in houses of correction, at hard labor or otherwise, of all persons liable to be imprisoned or confined under this act or any act relating to said city, or any ordinance of the common council. * * * Said council shall also have power, except as herein otherwise specified, to provide for the punishment of all persons offending against this act, or any law relating to said city, or any ordinance of the common council enacted under this or any other act of the Legislature, by imposing fines, penalties, forfeitures, and costs, and by imprisonment in the house of correction of said city. * * * If only a fine, penalty, forfeiture, or costs be imposed, the offender may be sentenced to imprisonment until the payment thereof, for a term not exceeding six months. * * * No penalty or forfeiture shall exceed one thousand dollars; no fine shall exceed five hundred dollars; and no imprisonment shall exceed the period of two years."

Under the authority claimed to have been conferred by the foregoing provisions of the charter the common council passed an ordinance entitled "Disorderly Houses," section 1 of which provides that—

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"No person shall keep within the limits of the city of Detroit any house of ill fame, house of assignation, or house for the resort of common prostitutes, * * * or shall in any manner contribute to the support, carrying on, or keeping of any such house or place."

Section 4 provides that—

"Any person who shall violate any of the provisions of this ordinance shall be punished by a fine not to exceed five hundred dollars, and costs of prosecution; and the offender may be sentenced to be imprisoned in the house of correction until the payment thereof: *Provided, however*, that the term of such imprisonment shall not exceed six months."

Daniel Hanrahan, the respondent, pleaded guilty in the recorder's court of the city of Detroit to a complaint made against him under said ordinance of keeping and maintaining a certain house of ill fame, resorted to for the purpose of prostitution and lewdness, and was sentenced—

"To pay a fine of five hundred dollars forthwith, and, in default thereof, be committed to the Detroit House of Correction, and therein safely kept and employed, according to the laws thereof, until said fine, and the costs of commitment, one dollar, be paid: *Provided, however*, that said term of imprisonment shall not exeeed the period of six months."

The fine was not paid, and he was committed, whereupon he sued out a writ of *certiorari*, and has brought the record here for review.

He assigns as error—

1. The want of power and authority of the recorder's court to impose the sentence.
2. That the ordinance under which the proceedings were had is not, in effect, within the title of such ordinance.
3. That the general statutes of the State covered the offense charged, and provided for its punishment.
4. That the amendment of 1887 entirely superseded the ordinance.

All of which went to the jurisdiction of the court to impose the sentence.

There is no merit in the objection relating to the title of

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the ordinance, and it needs no discussion. The constitutional provisions relating to laws passed by the Legislature do not apply to ordinances enacted by a common council of a city.

Under our Constitution the power to enact laws is vested in the Legislature. But the Legislature is authorized by Article 4, § 38, to confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative, and administrative character as they may deem proper. The object was to secure to local municipalities the power of self-government in matters of purely local concern.

The nature and extent to which the Legislature may confer this legislative power upon municipalities within their territorial limits is entirely within the discretion of the Legislature. In exercising the power conferred of passing such laws of a local character as the wants of a particular community call for, it must happen that very many of the lesser crimes and misdemeanors which are punished under general laws must come under the police regulations of such municipalities, because they are more liable to be perpetrated by the vicious class who congregate in cities than elsewhere; and the peace and good order of the municipality require that they should be more promptly and summarily dealt with than they could be under the State law.

I have no doubt that it was competent under the Constitution for the Legislature to confer upon the common council of the city of Detroit the authority contained in the sections of the charter above quoted. The ordinance appears to have been authorized by the charter.

That the suppression of houses of ill fame in a city is a matter of great local concern there can be no question. That it can be dealt with more effectively by the city authorities than by the State, I think is plain. It would be contrary to the fact to assert that houses of ill fame in the midst of a

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city are not dangerous and revolting nuisances. They contaminate the morals of society, and render respectable neighborhoods obnoxious to decent people by their presence. Their suppression demands the closest attention of the guardians of the peace, and the most stringent police regulations to accomplish the object.

These considerations, and others that might be suggested, show that the power conferred upon the common council was wise, and should be sustained, if there be no constitutional objection.

There is a great want of harmony in the decisions of the courts of last resort in the several states upon the power of municipalities to enact ordinances covering the same subject of the criminal laws of the state, and the effect of a prosecution under such ordinances as a bar to a prosecution under the state law. The subject is exhaustively treated and the authorities cited by Mr. Dillon in his work upon Municipal Corporations, in the chapters devoted to "Ordinances" and "Municipal Courts," and also in Horr & Bemis on Municipal Ordinances.

One of the strongest arguments to which my attention has been called against the exercise of this power by a municipality in case of a criminal nature is that the criminal laws of the State ought to be uniform in the elements which go to constitute the crime, the penalty or punishment imposed for the commission of the offense, and in forms and mode of procedure to prosecute the offender; that it is the province of the Legislature to declare what shall constitute crime, and to prescribe punishment therefor; that an offense against the criminal laws of the State is the same offense in whatever locality it is committed, and should subject the offender to the same punishment.

But these considerations are not fundamental. The Legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense, and

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shall be punished as a felony, while the same act, if done in another locality or section of the State, would not be a criminal offense at all. Such are the laws which prohibit fishing in certain waters, and many other laws which the Legislature declares shall only be operative in certain designated portions of the State.

There is no provision in our Constitution, as there is in some of the states of the Union, that all laws shall be uniform and equal throughout the State, and consequently the Legislature is not prohibited from legislating for particular localities.

Another argument has been urged with great force. It is asserted that the clause in the Constitution which authorizes the Legislature to confer upon organized townships, incorporated cities and villages, and upon the board of supervisors, such power of a local, legislative, and administrative character as they may deem proper, only appertains to such local, legislative, and administrative matter as municipalities had been in the habit of exercising from time immemorial; that these include only the ordinary and reasonable by-laws which incorporated cities and villages had been accustomed to enact for the preservation of good order in their local communities, to be enforced by the infliction of penalties and fines in a civil action, without power of imprisonment for breach of such by-laws.

It is claimed that it would be absurd to assert that the Legislature could authorize an organized township to enact criminal laws to be enforced in such township, or for a board of supervisors to do the same thing; that the doctrine, carried to its logical results, would authorize each township in the State, and each county to have its own code of criminal laws, differing from the others; that neighbors whose farms adjoined, or whose residences were separated by a highway, if residing in different townships, would be subject to different criminal laws; that it would be difficult to imagine the

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internecine strifes and bitterness that would be engendered by such a state of affairs.

To declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government. Unless authorized by the Constitution, this power cannot be delegated by the Legislature to any other body or agency. The general criminal laws of the State are in force in every part thereof, and no power but that which enacted can suspend or repeal them. The Constitution has granted to the Legislature authority to delegate to a city or village the right to enact by-laws and ordinances to prevent vice and immorality, and for the enforcement of good order within the limits of the corporation, and for numerous other purposes affecting the health and welfare of its people; and, acting under this authority, the Legislature has conferred power upon the municipalities to enforce the observance of these ordinances by fine or imprisonment, or both.

Common experience, and the necessities of our civilization, have shown that the grant to and exercise by cities and villages of such power to enact ordinances, and to punish for their violation, have been both wise and just, and have not operated oppressively upon the citizen. It is no reason why this power should not be delegated to cities and villages, that, if it should be also delegated to organized townships, it might be abused, and result in internecine strifes and altercations. If it should be attempted, and result in wrong or oppression to the people, the remedy is in their hands. The legislators are chosen by them, and it is in their power to effect any needed reform. Besides, it is quite unlikely that any such event should ever happen, as no necessity exists therefor.

The word "crime" is applicable to both a felony and "misdemeanor." So the words "offense" and "crime" are synonymous, when applied to convictions for violations of

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statutes of a public nature. *People v. N. Y. Police Commissioners*, 39 Hun, 507; *People v. French*, 102 N. Y. 583 (7 N. E. Rep. 913). The words are used interchangeably in our compilations. Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime.

An ordinance, validly enacted, prohibiting certain acts under fines, penalties, or imprisonment, is, within the jurisdiction of the municipality enacting it, as much entitled to respectful obedience, and is as much the law of the land for that locality, as a law enacted by the Legislature; and a person violating it commits an offense, and in one sense a crime, for which he may be sentenced, if under the authority of a statute the ordinance so provides, to imprisonment at hard labor. To hold that such offenses are not to be classed as crimes would be to take away the power of the Legislature or municipalities from imposing a punishment by imprisonment at labor, or sentencing to confinement where labor upon inmates is imposed or compelled; for Article 18, § 11, Const. declares that—

"Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this State."

Under any other construction of the word "crime," common vagrants, mendicants, vagabonds, montebanks, jugglers, and a large class of offenders against the general laws as well as ordinances duly enacted, would have to be confined in prison without work, and be there supported at the public expense, in idleness.

It rests in the sound discretion of the Legislature to determine to what extent they will give to municipal courts authority to punish offenders. But whatever authority is delegated to municipalities to legislate upon the subject of offenses, and to prescribe within certain limits the punishment to be inflicted therefor, it is clear that the constitu-

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tional rights of the accused must be protected and preserved in everything that is done, as fully as if the prosecution was for a crime under the general laws of the State. In cases where, on account of the nature of the punishment which may be inflicted, it is classed as *infamous*, every constitutional safeguard must be preserved to the accused. He cannot be denied the right of trial by jury; to be informed of the nature of the accusation; to be confronted with the witnesses against him, etc. In short, the proceedings against him must be by due process of law.

What punishments are considered as infamous are pointed out by Mr. Justice Gray in *Ex parte Wilson*, 114 U. S. 417 (5 Sup. Ct. Rep. 935). He said:

"Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of * * * in the thirteenth amendment of the Constitution, by which all other slavery was abolished."

See also *Jones v. Robbins*, 8 Gray, 329, 349; Article 18, § 11, Const. Mich. In the case of *Ex parte Wilson* the Court held that a sentence to hard labor in the Detroit House of Correction for a stated time was an infamous punishment.

Hard labor, in itself, is not infamous or degrading. On the contrary, it is ennobling, and is the foundation upon which reposes all true progress in mental and moral development.

"An angel's wing would droop if long at rest,
And God himself, inactive, were no longer blest."

The infamy and degradation consist in its being involuntary. The distinction is the difference between liberty and slavery.

In Hanrahan's case he was arrested and brought before the court upon complaint on oath and warrant charging him with the offense, of the commission of which he pleaded guilty. The charter provided for his trial by jury, if he demanded it. His arrest, conviction under a plea of guilty,

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and sentence appear to have been in accordance with due process of law. The ordinance under which he was convicted did not permit punishment by imprisonment to be imposed, but authorized the imposition of a fine, and, in default of payment, with imprisonment until paid, not exceeding six months.

The only question of importance is whether the Legislature, by the amendment of 1887, making the offense a felony and punishable as such, repeals the provisions of the city charter above quoted. There is no repeal in express terms, and repeals by implication are not favored. *Gordon v. People*, 44 Mich. 485 (7 N. W. Rep. 69); *Ryan's Case*, 45 Id. 173 (7 N. W. Rep. 819); *Brown v. McCormick*, 28 Id. 215; *Breitung v. Lindauer*, 37 Id. 233.

Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statutes. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative, or cumulative, or auxiliary, and not inconsistent, both must stand, and the former is not repealed. *People v. Bussell*, 59 Mich. 104, 109 (26 N. W. Rep. 306); Dwar. Stat. 674; *Landis v. Landis*, 39 N. J. Law, 274; *Ruckman v. Ransom*, 35 Id. 565, 566; *Bowen v. Lease*, 5 Hill, 221; *Kinney v. Mallory*, 3 Ala. 626; *Planter's Bank v. State*, 6 Smedes & M. 628; *Supervisors v. Campbell*, 42 Ill. 492; *Norwich v. Story*, 25 Conn. 47.

It must be noticed that the acts we are now considering are not both local acts, as was the case in *People v. Bussell*, but one is a local act, and the other a general act, and the rule of law in such case is that a subsequent general law will not by implication, operate as a repeal of a special law on the same subject, although inconsistent with it. *Ottawa v. La Salle Co.* 12 Ill. 339; *Kenaga v. Kerr*, 14 N. E. Rep. 671; *Nichols v. Bertram*, 8 Pick. 342; *Com. v. Worcester*, Id. 462; *Brown v. Lowell*, 8 Metc. 172, 174; *Tracy v. Goodwin*, 5 Allen, 410; *Granly v.*

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Thurston, 23 Conn. 420, 421; *City of Janesville v. Markoe*, 18 Wis. 350; *In re Evergreens*, 47 N. Y. 216; *In re Park Commissioners*, 50 Id. 493; *People v. Quigg*, 59 Id. 83; *In re Canal Co.*, 69 Id. 209; *McKenna v. Edmundstone*, 91 Id. 231; *State v. Roosa*, 11 Ohio St. 16.

In *People v. Quigg, supra*, Allen, J., said:

"No intent of the legislature to repeal or interfere with special statutes, applicable only to the city of New York, can be implied from general legislative action upon the subject. Repeal of statutes by implication is not favored, and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end."

And in *McKenna v. Edmundstone*, Andrews, J., said:

"It is well settled that a special and local statute, providing for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions, and application, unless the intent to repeal or alter is manifest, although the terms of the general act are broad enough to include the cases embraced in the special law."

In *Brown v. Lowell*, 8 Metc., at page 174, Chief Justice Shaw, speaking upon the subject, said:

"That a subsequent legislative act repeals all prior acts repugnant to it is a principle which results from the unlimited nature of legislative power. The last expression of the legislative will must be carried into effect as the law of the land; and if, on its true construction, it is directly repugnant to any prior act, it necessarily annuls it, because both cannot exist together. But to have this effect it must appear that the legislative will was so exercised, or, in other words, that it was the intention of the legislature that the subsequent act should so operate, notwithstanding any repugnancy to former acts. It may happen that acts of special legislation may be made in regard to a place, growing out of its peculiar wants, condition, and circumstances; as formerly various acts were passed in relation to the town of Boston. Afterwards a gen-

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eral act may be passed having some of the same purposes in view, extending them generally to all the towns of the commonwealth. * * * It would be a question depending upon a careful comparison of the two acts, and the objects intended to be accomplished, whether the general act must be deemed an implied repeal of the special prior act. In general, we should think it would require pretty strong terms in the general act showing that it was intended to supersede the special acts, in order to hold it to be such a repeal."

This language was quoted and applied in *Tracy v. Goodwin*, 5 Allen, 410.

The Legislature has recognized the fact that houses of ill fame are more obnoxious in cities and villages than in the more sparsely populated districts, and consequently for more than thirty years there has not been a city charter granted but it contained express authority for the common council to enact ordinances to suppress them.

In the general law for the incorporation of cities, enacted in 1873 (chapter 11, § 1, subd. 4, p. 296), it is provided that the common council may pass ordinances—

"To prohibit and suppress all disorderly houses and places, houses of ill-fame, assignation houses, gambling houses, and all places where persons resort for gaming, or to play at games of chance, and to punish the keepers thereof."

And this power has been conferred, notwithstanding the statutes all the while contained the general law upon the subject above quoted. Under these circumstances it appears plain to me that the Legislature intended not only to confer upon the city of Detroit the authority to pass the ordinance in question, but that it should be exercised and enforced by the municipal authorities. Had not the Legislature, by the amendment of 1887, increased the penalty, and made the offense a felony, it is not likely that the question would have been raised.

But it must be remembered that the offense of keeping a house of ill fame, resorted to for the purpose of prostitution

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or lewdness, was not a new offense created by the amendment of 1887. So far as this provision of the statute is concerned, it remains the same as it originally stood before the amendment. *Gordon v. People*, 44 Mich. 485 (7 N. W. Rep. 69).

The penalty is changed and made more severe, and new offenses are added. But I can perceive no intention in this to abrogate or repeal the special acts conferring upon the city the power to suppress houses of ill fame, resorted to for the purpose of prostitution or lewdness, and to punish the keepers thereof.

Judge Dillon, in his work on Municipal Corporations (volume 1, §§ 87 and 88, 3 l ed.), says:

"It is a principal of very extensive operation that *statutes of a general nature do not repeal*, by implication, *charters and special acts* passed for the benefit of particular municipalities; but they do so when this appears to have been the purpose of the legislature. If both the general and the special acts can stand, they will be construed accordingly. If one *must* give way, it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. * * * The presumption is not lightly to be indulged that the legislature has by *implication repealed*, as respects a particular municipality, or as respects all municipalities, *laws of a general nature*, elsewhere in force throughout the state; yet a charter or special act passed subsequent to the general law, and plainly irreconcilable with it, will to the extent of the conflict operate a repeal of the latter by implication."

The learned author also discusses in sections 366, 367, and 368 of the same volume the validity of ordinances relating to public offenses. He states that the cases, many of which are cited, cannot be reconciled; and in view of this fact he lays down, with some distrust of their entire correctness, these rules:

1. A general grant of power, such as authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act which is made punishable as a criminal offense by the laws of the state.

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2. Where the act is in its nature one which constitutes two offenses,—one against the state and one against the municipal government,—the latter may be constitutionally authorized to punish it, though it be also an offense under the state law.

3. When the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws.

Most of the decided cases will range themselves under the three general rules above laid down. But these rules do not cover a case where the legislature, having a constitutional authority to delegate legislative power to a municipality, has conferred *express authority upon it to legislate upon a particular act* declared by the general law to be a crime, and punishable as a criminal offense under the general law. In such case, where the local body exercises the power conferred by passing an ordinance, it becomes the law of the territory over which the local body has jurisdiction. It has the same force and effect as law as a like act of the legislature would have if passed in the very terms of the ordinances.

Take the case under consideration as an illustration. Suppose in 1884 the Legislature had passed a special act for the city of Detroit in the very words of the ordinance; then we should have had a general law of the State, and also a special law applicable to and in force only in the city of Detroit, both covering the same object, namely, suppressing houses of ill fame, defining the offense in the same language, and prescribing different punishments therefor. Applying the familiar rules of construction, the special law would operate as a repeal by implication of the general law in the city of Detroit. *McGavisk v. State, M. & E. R. R. Co.*, 34 N. J. Law, 509; *State v. Clarke*, 54 Mo. 17.

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Suppose later, and in 1887, the general law was amended so as to increase the severity of the penalty, and make the offense a felony; would it be entirely clear that the amendment was intended to operate as a repeal of the special act?

In all questions relative to repeals by implication the intention of the Legislature is the prime object of inquiry. And such intention must be gathered from the language and purposes of the respective enactments, as well as all laws bearing upon the subject.

There is nothing in the amendment indicating that the law should have a more extended territorial operation than before. There is nothing in the current history of events which indicates that there was a necessity for a more stringent enactment to prevent and punish this crime in the city of Detroit; on the contrary, we cannot well ignore the notorious fact that the necessity for a more severe penalty arose from the atrocious acts of parties who kept such houses in the vicinity of lumbering camps and mining towns, at places very remote from the city of Detroit, and whose nefarious schemes in enticing females into their dens of iniquity shocked the sensibilities of the whole people of the State, and resulted in the amendment of the law, declaring it a felony, and ordering the act to take immediate effect. Where no repealing words are inserted in a later act, a strong presumption arises that no repeal was intended, or it would have been expressed. *M'Neely v. Woodruff*, 13 N. J. Law, 356.

My conclusions, based upon what I consider reason, and the decided weight of authority, are these:

The local act may be exclusive of the general law, and operate to repeal it by implication; as where its provisions are repugnant to or inconsistent with the general law.

Both laws may be concurrent; as where there is no repugnance, or where one is merely auxiliary or cumulative to the other.

In the former case there can be no prosecution except under the local law.

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In the latter case prosecutions may be instituted under either law, and the court that first acquires jurisdiction over the person of the accused has exclusive jurisdiction to hear, try, and determine the case; and a conviction for an offense which is the same in both laws will be a bar to a prosecution for the same offense under the other law.

I think the ordinance in question is valid, and that the charter provisions authorizing its enactment were not repealed by implication, but are in force, and valid. It follows that the conviction must be affirmed.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred.

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WILLIAM A. COOTS v. THE CITY OF DETROIT.

Municipal corporations — Negligence — Injury to member of fire department by reason of defective street—Master and servant—Liability of city.

1. The *statutory* duty imposed upon the city of Detroit to keep its streets in repair, and reasonably safe and fit for the public travel, extends to the members of the fire department, the same as to others of the traveling public.
2. The relation of master and servant does not exist between the city of Detroit and members of its fire department.

Error to Wayne. (Reilly, J.) Argued June 7, 1888. Decided July 11, 1889.

Case for injury by reason of defective street. Defendant brings error. Affirmed. The facts are stated in the opinion.

John W. McGrath and *Fred H. Warren*, for appellant.

Dickinson, Thurber & Hosmer (*Elliott G. Stevenson*, of counsel), for plaintiff.

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MORSE, J. This is an action brought by the plaintiff against the city of Detroit to recover damages for injuries received by reason of the defective condition of Michigan avenue between Fourteenth and Fifteenth streets.

He recovered a judgment for $10,000 in the circuit court for the county of Wayne, before a jury.

The facts, as shown by plaintiff, are substantially as follows: At the time of the injury he was in the employ of the fire department as an engine-driver. The engine-house was situated on Sixteenth street, four blocks from Michigan avenue. Plaintiff had been in the employ of the fire department for four years as a driver.

July 6, 1886, there was an alarm of fire from box 319, which was on the corner of National avenue and Locust street. He drove his engine down Sixteenth street, to Michigan avenue, and turned on that avenue to go to Twelfth street. Between Fourteenth and Fifteenth streets the right fore wheel of the engine dropped into a hole, and he was thrown from his seat, and fell against the engine, severely injuring him. At this time he was following the hose cart, as was customary in going to a fire. A lieutenant of the fire department was on the hose cart, and directed the course to be taken to reach the place of the fire.

The hole into which the wheel dropped was about 18 inches deep, from 3 to 4 feet in width, and about 10 feet in length crosswise of the street. The plaintiff was not aware of its existence. He knew of a bad spot in the street on the other side before reaching the place of the accident, and had changed his course to avoid it. When hurt he was driving nearly in the center of the street, with the wheels on one side running between the rails on the street-car track.

He testified he did not notice the hole until the wheel went into it, as one of the horses jumped it. He had "to look out for street cars, for people passing, for brick wagons and

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farmers, people crossing the street, etc." He claimed that he had perfect control of his team, and was keeping a sharp lookout to avoid accidents.

It appeared without dispute that this hole was caused by the street being out of repair, the paving blocks and boards underneath them having been removed because they were worn out and useless.

By the charter of the city of Detroit the board of public works are given the entire charge and control of the repairs of paved streets within the city. It was shown that about the first of June, 1886, the board of public works were notified that the common council of the city had directed by resolution that the pavement on Michigan avenue, between Thirteenth street and Mt. Hope avenue, be repaired, the expense to be paid out of the general road fund. This territory embraced within its limits the spot where the accident occurred. To this resolution the board of public works replied, in a communication stating that the pavement was laid in 1871, "and is completely worn out, and no blocks left to repair the same," and recommending that the street (Michigan avenue) should be "repaved entire with stone."

The secretary of the board testified that the board of public works had notice that Michigan avenue, between Thirteenth and Sixteenth streets, was out of repair for several weeks prior to June 1, 1886; therefore the question of notice is out of the case, and need not be considered.

The first objection against the judgment is that the plaintiff was guilty of contributory negligence, and it is claimed that the jury should have been so instructed, and a verdict directed against him. It is argued that he ought to have seen this hole; that it was a defect so open and notorious that, if the plaintiff had been exercising ordinary care and prudence he could not have failed to have discovered it.

This argument would be of great force, and perhaps conclusive, if applied to an ordinary traveler upon this street.

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But the plaintiff, by his occupation, and under the orders of the fire department, by which he was employed, was obliged to drive as rapidly as possible to the scene of this fire. He must also take the streets marked out for him by his superior officer upon the hose-cart. As he testified, he was compelled as a necessity to keep his eyes open, and be on the watch for a variety of things, to save accident and peril to himself and to other people who were traveling, and had a right to travel, on this street. Consequently he cannot be held to the same degree of negligence as one who might drive on this street as slowly as he pleased, or who need not take it at all if he knew it was out of repair. While looking out for a street-car or a wagon, or even passengers on the street, he could not well keep his eyes upon the ground all of the time, and it might well happen that in a moment when his sight was directed to another peril, and while he was striving to avoid it, his forward wheels, or one of them, would drop in a hole before he noticed it, and without his fault. This part of the case was properly submitted to the jury upon the evidence.

It is also claimed that the defect in the street that caused this accident was within one of the risks that the plaintiff took in his employment; and the court was asked to instruct the jury that the plaintiff having voluntarily entered into the service of the fire department as an engine-driver, with full knowledge of the kind of work he was expected to do, and while in such employment, and in the regular discharge of his duty as such fireman, he was injured by driving into a hole in one of the streets of the city, he could not recover, as this was one of the dangers incident to his employment.

I do not think the court erred in refusing this instruction.

I know of no rule of law that would compel the plaintiff to take notice that the city of Detroit, through its officials, would, after notice of such a defect as this, violate the plain provisions of the statute requiring its streets to be kept in "good repair, and in a condition reasonably safe and fit for

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travel;" and it would be not only absurd, but a manifest failure of justice, to hold that the city of Detroit must be excused from liability because the plaintiff must, as a matter of law, presume and take notice that the city will violate this statute and disregard the duty laid upon it by the Legislature. No more need be said upon this subject.

It is also contended that the plaintiff is barred from his action against the city because section 1, chap. 18, of the charter of the city of Detroit, provides that any person who may be hereafter totally disabled in the discharge of his duties as such fireman for duty may be placed upon the list of retired firemen by a vote of the fire commission. Such commission may in like manner place upon such list for disability any fireman who has been employed by said fire commission for a period of 25 years subsequent to October 24, 1860. Such retired firemen receive a sum equal to one-half of their annual salary paid them at the time of their retirement annually thereafter, to be paid in monthly payments during their natural lives. No person so retired shall receive more than $450 per annum, and said commission may place on such list the names of persons who became totally disabled in their employ prior to the passage of the act authorizing the commission to retire and pension firemen.

The argument is that the Legislature, recognizing the dangerous nature of the employment, authorized the city of Detroit, through its fire commission, to thus pension its firemen for total disability, and that the plaintiff is to be presumed to have known of this provision of the charter, and to take his employment with reference to and in view of it; and that the logical conclusion, therefore, is that this provision of the charter is intended to be in lieu of all other claims which the fireman might otherwise have for injuries received while in the line of his duty under his employment.

This provision in the charter was not inserted until 1885, and after the plaintiff had entered the employment of the

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fire department. He cannot, therefore, be said to have entered the service in view of this provision.

Nor do I think he could be bound by it if he had. This provision is only permissible. The fire commission may retire a fireman for total disability, or they may not, as they see fit. They have no power to retire any employé who has not served for 25 years since 1860 for any less reason than a total disability. And it would seem that the commission are the sole judges of whether the disability is total, or whether it was incurred in the line of duty. The plaintiff has not assented, by word or deed, to any arrangement whereby he shall forego his claim for damages for this unlikely happening,—this faint hope of a pension from the fire department. No steps have been taken to retire him, and there are no means by which he can compel such retirement.

It cannot be said that by his hiring, or by his remaining in employment after knowledge of this law, he contracted to give up all claims he might thereafter have against the city of Detroit for injuries received in the line of his duty through the negligence of the city, because he would thereby be required to give up something for nothing. Such a contract would not be mutual, because there is nowhere any binding or legal obligation upon the part of the city or the fire commission to retire and pension him.

The counsel for the city argues that "may" in the law means "shall" or "must;" that this provision entered into and became a part of the consideration of every contract made between the city of Detroit and its firemen since the passage of the act, and that the courts would enforce its provisions in favor of every fireman totally disabled while in the employ of the fire department. If this contention is correct, why did the act provide that such firemen "may" be placed on the list "by vote of said commission?" If the duty is imperative, why should the commission vote to perform it before it can or may be done?

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It is plain enough that the whole matter of the retirement and consequent pensioning of disabled firemen is by this act placed within the discretion of the fire commission, who may pension a totally disabled fireman or not, as they see fit. The only object of the passage of the act was to grant them this power if they desired to use it, which power they did not possess before it became a law.

No authority is cited to sustain this idea that this provision of the charter bars the plaintiff in this action, and it is unlikely that any such authority can now or ever will be found.

The court was asked to instruct the jury as follows:

"It appears in this case that the board of public works have charge and control of the streets in the city of Detroit, and that they failed and neglected, after notice and direction by the common council, to repair the defect in the street which caused the accident.

"In this connection I charge you that the board of public works and the members of the fire department, all being in the employ of the city of Detroit in carrying on its general business, are fellow-servants; and if the jury believe that the accident to the plaintiff would not have happened but for the careless and negligent failure of the board of public works to repair the pavement on Michigan avenue, after being directed by the common council so to do, then the plaintiff cannot recover, for his injury would be directly chargeable to the negligence and carelessness of a fellow-servant."

It is also intimated in the brief of defendant's counsel in stating their six general propositions of error, incidentally, in considering the point that the plaintiff, when he voluntarily entered the service of the fire department, took upon himself all the risks and dangers incident thereto, that this injury must be considered as occurring from the negligence of fellow servants. But the point was not strenuously urged, and it does not seem to me that there is any merit in it.

It may be true that the fire commission could not sue the board of public works or the city of Detroit for injuries to the engine, or the horses drawing the same, occasioned by a

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defect in the streets. But the plaintiff, by entering the service of the fire department, does not lose his personality or his manhood; he does not become a mere machine, a block of wood, nor yet a mere animal. He cannot be considered in any sense the property of the fire commission. And the fire commission is not suing the city for the damages he has received, as it would have to sue if an action was maintainable for the loss of a horse or injury to an engine. The plaintiff for himself, and in his own right, and independent of his relations to the fire department, is suing for a personal injury to himself caused by the neglect of the city.

If the theory of the request asked be good law, then there is no person in the employ of the city, or any of its agencies, nor any official, from mayor down to constable, who can recover for injuries caused by a defective street while he is in his employment, or in the discharge of his official duties, even if his employment or the duties of his office have no connection whatever with or relation to the care and control of the streets of the city. For instance, a constable, while walking in the streets for the purpose of serving process, would be without relief if he should be injured by a defect in the same; and a person employed to sweep the city-hall, or scrub its steps, if sent through the streets for a broom or brush to work with, would be a fellow-servant of the officials and employés whose duty it is to keep the streets in good repair. The doctrine of fellow-servant has never been carried to this extent by any court.

It is said that this is the first instance of an attempt to hold a municipality liable for an injury to a fireman in the performance of his duties under his employment. This is a mistake. In the case of *Palmer v. City of Portsmouth*, 43 N. H. 265, 267, this question was involved, and it was held that the principle—

"Applied by the courts in the case of the servants of railroad companies who have sustained injuries in the course of

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their employment does not seem to us at all applicable to the case of injuries sustained from defects of highways. The liability for the damages sustained in such cases is imposed by statute, which provides that in case any special damage shall happen to any person by reason of obstructions, etc., he shall recover his damage in an action against the town. No exception is made, and we can see no reason for making any in such a case."

Our statute giving damages to any person injured by reason of streets and highways not being in good repair, or in a condition reasonably safe and fit for travel, through the negligence of the city or township, makes also no exception of persons or their occupations; and there is no reason in the law or in good sense why an engine-driver in the employ of the fire department, whether in or out of the line of his employment at the time of the injury, should suffer such injury without redress or recompense under the statute, from and by reason of the city's negligence in the care of its streets, than should any other citizen.

A fireman takes, like every other employé, certain risks by reason of his employment. He may be injured by his fellow-firemen, by falling walls or building, or by a score of accidents that are liable to happen at a fire, or going to or from one. But the injury he receives from the negligence of the city in the care of the streets through which his employment takes him is no more one of the risks he voluntarily takes in his employment than would be an injury that he might receive from the negligence or wrong of some one of his fellow-citizens of Detroit, as he was passing along the street. If this hole in the street, for instance, had been an excavation made by some abutting lot-owner on the street, and negligently left open, is there any sound reason why the plaintiff could not have recovered from such lot-owner damages for his injuries, if such injuries were occasioned through no fault of plaintiff? The answer is obvious. The fact that plaintiff was a fireman would weigh no more in

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such case than if he was an express wagon driver, or of any other occupation.

The last objection to the judgment is that it is too large; that the damages found by the jury are excessive; and for this reason the judgment should be set aside, and a new trial granted.

But, if the damages are excessive, it is beyond our power, under the law, to remedy the wrong. We cannot cut down the verdict or grant a new trial for this reason. It is our province alone to determine whether any errors of law have taken place in the trial of the cause or the proceedings before judgment, and whether or not a proper judgment has been entered upon the verdict of the jury. We have nothing to do with the errors of the jury, if any have been committed, in the settlement of disputed questions of fact, or in the award of damages.

Within the limit of our authority to review this case I find no error, and the judgment, therefore, must be affirmed, with costs.

LONG, J., concurred with MORSE, J.

CHAMPLIN, J. Members of the fire department of the city of Detroit, when acting in discharge of their duties, are not servants or agents in the employment of the city for whose conduct the city can be held liable, but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct while acting in discharge of their official duty. *Hafford v. New Bedford,* 16 Gray, 297. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own

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official acts, and not the acts of the municipal corporation or its agents. *Fisher v. Boston*, 104 Mass. 87; 2 Dill. Mun. Corp. § 976 (774). Hence the relation of master and servant does not exist between the city and members of its fire department. *Jewett v. New Haven*, 38 Conn. 368; *Knight v. Philadelphia*, 15 Wkly. Notes Cas. 307.

This doctrine was laid down in the case of *Freeholders v. Strader*, 18 N. J. Law, 108, 121, as follows:

"Where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty whenever such breach or neglect has occasioned an injury to that individual; but if such corporation owe a duty to the public, and neglect to perform it, although every individual comprising that public is thereby injured, some more, some less, yet they can have no private remedy at the common law."

And in the later case of *Condict v. Jersey City*, 46 N. J. Law, 157, which was a case where the board of public works employed one Roberts to remove ashes, which had been placed in receptacles for that purpose, and cart them off to the dumping grounds,—both horse and cart belonged to the city,—and Roberts by his negligence in dumping killed plaintiff's intestate, it was said:

"It is the settled law of this state that an action will not lie in behalf of an individual who has sustained a special damage from the neglect of a municipal corporation to perform a public duty, unless the right to sue for such an injury is given by statute."

In *Wild v. Paterson*, 47 N. J. Law, 412, where action was brought against the city by a member of the fire department for injuries sustained by reason of its failure to keep a fire-engine in repair, the court said:

"The relation is not the ordinary relation of master and servant. Employés of such corportions in the execution of its public duties have been held to be mere instruments in the performance of such duties, and to act as public officers charged with a public service;" citing *Condict v. Jersey City*, 46 N. J. Law, 157.

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See, also, *Barney v. Lowell*, 98 Mass. 570; *Hayes v. Oshkosh*, 33 Wis. 314. And such, also, is the settled law of this State.

Had the accident which occasioned plaintiff's injury happened by the defect in the axle of the engine, or other defect in the machinery or apparatus, instead of through a defective street, he could not have recovered, for the reason that the relation of master and servant did not exist between them, and the city owed no duty to the members of the department to provide suitable and safe apparatus.

The third, fourth, and seventh requests of defendant's counsel were as follows:

"3. It is a general rule of law that, when a person engages in a business or line of employment deemed hazardous or dangerous, he assumes the risks and dangers incident thereto, and cannot demand compensation from his employer for an accidental injury.

"4. An employer cannot be held liable for injuries received by an employé who has voluntarily assumed the risk of the employment with full knowledge of the methods employed; and in this case, it appearing that the plaintiff was in the employ of the city of Detroit as fireman; that he entered such service voluntarily, and with full knowledge of the kind of work that he was expected to do; and that while in such employment, and in the regular discharge of his duty as such fireman, he was injured by driving into a hole in one of the streets of said city,—I charge you that this was one of the dangers incident to his employment as such fireman, and that he cannot recover."

"7. Members of the fire department are presumed to have cognizance of such defects in the construction or condition of the streets in their respective fire districts as are open to observation, and to take the risk of accidents therefrom, and to use reasonable care in examining their surroundings."

The general rule of law is well stated in the third request, and was sufficiently covered by the charge of the court; and so with the principle stated in the fourth request.

These principles apply to cases where the relation of master and servant exists between the employer and the employed.

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But in cases where the employed perform duties imposed by law for the benefit of all the citizens, as in a fire department of a city, as before stated, the relation of master and servant does not exist, and the liability or non-liability of the city to a member employed in such department does not depend upon that relation. It may be stated that the city is not liable to a person employed in the fire department for injuries arising from accidents received in the course of such employment, unless the liability is created and a right of action is given by statute.

The question of liability of the defendant to the plaintiff is therefore reduced to this: Does the statutory duty imposed upon the city to keep its streets in repair, and reasonably safe and fit for the public travel, extend to the members of the fire department, the same as to others of the traveling public?

I can see no good reason why it should not. The statute makes no exception of the kind. It reads that—

"Any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect," etc., "of the city to keep the same in good repair, and in a condition reasonably safe and fit for travel."

The same question was considered by the supreme court of New Hampshire in *Palmer v. City of Portsmouth*, 43 N. H. 265. Bellows, J., speaking for the court, said:

"The principle which has been applied by the courts in the case of the servants of railroad companies who have sustained injuries in the course of their employment does not seem to us at all applicable to the case of injuries sustained from defects of highways. The liability for the damages sustained in such cases is imposed by statute, which provides that in case any special damage shall happen to any person by reason of obstructions, etc., he shall recover his damage in an action against the town. No exception is made, and we can see no reason for making any in such a case."

The action was brought by a fireman who was injured while hastening to a fire by coming in contact with some pieces of board left on a joiner's work-bench in the street.

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It is a proper use of the streets of a city to pass over them with a fire-engine in going to a fire, and they should be kept in such reasonable repair as will be safe and fit for the purpose of this kind of travel, as well as any other that the public require. The service demanded of those having the management of apparatus for the extinguishment of fires is that they shall respond promptly, whether at night or by day, to alarms of fire, and get to the scene of the conflagration with such dispatch as is reasonable and consistent with the safety of the public and themselves. They have a right to expect that the statutory duty enjoined upon the city will be observed. They take all the risks incident to their employment, without any remedy over against the city in case of injury, unless such injury is occasioned by a neglect of duty positively and specifically enjoined upon the municipality by statute.

The risks of the employment assumed by them are sufficiently numerous and dangerous, without adding thereto the risk of defective streets, which the city is enjoined to keep in repair. As to such streets, their rights are no greater and no less than those of any other person having a right to use such streets.

As the questions of defendant's negligence, and its liability under the statute, and the contributory negligence of the plaintiff, were properly submitted to the jury, and they having found those questions of fact in favor of the plaintiff, I concur in affirming the judgment.

CAMPBELL, J. Plaintiff, who is and has been for several years in the employ of the city of Detroit in the fire department, and who was in July, 1886, driver of one of the steam fire-engines, drawn by horses, sued the city of Detroit for injuries received while driving to a fire on the sixth day of that month, during the day-time. The accident happened on Michigan avenue, and was caused by a fore wheel of the engine jolting in a hole in the pavement, which jarred plaint-

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iff, and threw him against a part of the engine, that strained and injured his back. The injury turned out to be severe, and disabled him for a time, and has partially disabled him ever since. The jury rendered a verdict of $10,000, which appears to be a very heavy one, considering all the testimony, but which we need not now consider separately.

An objection is made that plaintiff, while employed in the service of the city, assumed all the risks of his employment, and that he cannot recover damages for injuries received during the service, and in the course of his work; and in this connection it is pointed out that provision is made by law for pensioning disabled firemen, which is not done in the case of any other persons in public employment under the city. The plaintiff had been kept in service and on full pay, and therefore had not been pensioned under the statute. It is a statute passed in 1885,—

"To provide for the retirement of aged and disabled firemen, and the payment of pensions to the wives and children of deceased firemen killed in the service of the city of Detroit,"—

Approved June 16, 1885.

It authorizes firemen who since 1860 have or shall have served 25 years to be placed on the retired list by vote of the commission for disability. It does not require, although it permits this for mere length of service, because there are probably a good many who after that service are as able as ever to serve and to earn their full wages. It also provides that any person in the service who is or may be thereafter "totally disabled, in the discharge of his duty, as such fireman for duty," may in like manner be placed on the list of retired firemen. All retired firemen are to receive during their lives a sum equal to half of their salary when retired, but not to exceed $450 per annum. Provision is also made for cases of death. Provision is also made for cases where persons cease to be entitled to pensions; but this prob-

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ably was designed to reach the cases of members of firemen's families who by reason of marriage or passing a certain age (in case of infants) have no further claim.

Under this statute it is evident that the fire commission need not retire a fireman of any age who is willing to continue in the active service, if they choose to keep him employed; and it is also clear that they may find special work for a person not able to do all kinds of service. It may be an object to the fire commission to retain in active employment persons who will be useful, and it will always be an object to the fireman to get full, instead of reduced, wages. But, while this amount of discretion is left to the commission, it seems to us that the object of the statute is to secure to deserving firemen an absolute right to go upon the retired list after 25 years' good service, and to persons disabled by injuries received in the course of duty a similar right.

Upon the argument we were not at first impressed so much as we have been since by the claim that the plaintiff was injured by one of the risks which were incident to his employment.

It appears from the record that it is customary for the steam-engines to follow the lead of the hose cart, on which there is a captain or lieutenant of the force. The city government has nothing to do with the selection of these officers or of the firemen. It cannot remove or discipline them. They are under the exclusive orders of the fire commission. When a fire breaks out, their duty is to go to the place of the fire as speedily as they can, and they must go in the way the officer directs. It may, and often will, happen that the officer knowingly or ignorantly chooses a way that includes roads out of repair, and having places inconvenient and involving some risk of injury. A road that furnishes better average facilities for rapid running, although having bad spots in it, may be thought better for his purposes than one that, although safe throughout, is not well adapted to high speed with such

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heavy machines. In the present instance it appears that the pavement on Michigan avenue was known to everybody in the department to be in bad order in many places, and in such a way that, while rather inconvenient than unsafe for ordinary travel, it would involve mischief almost inevitably to a heavy machine run rapidly over it, and not slacked at the rough places. With all of the defects, it was probably superior to the unpaved streets in the district for use by heavy engines, which cannot be run fast over ordinary natural roads. It is the duty of the firemen to go to a fire, whatever may be the state of the roads, unless absolutely impassable. And it is their duty to obey orders in the road chosen by their superiors. They do not lose their personality so far as to entitle them to incur risks which they can avoid by the use of their own common sense, and ought to avoid. But on all ordinary occasions they are subject to orders, and bound to run such risks as their duty involves.

The law is not entirely reasonable or entirely consistent on all subjects. Where made by statute, the legislative will stands in lieu of reason. And courts are not infallible, and may not see things alike. But it is the general purpose of both written and unwritten law to make no one liable who is not at fault. There are certainly exceptions in practice to this rule, and there is some vicarious responsibility which is founded on supposed policy, which does not strike all persons alike in its reasonableness. But no liability ought to be extended beyond what is reasonable, except in pursuance of legal rules, which to that extent override all questions of reason.

In those cases of employment where the employer does not have much personal knowledge of what is going on in its details, the rule is very general that every person employed assumes the risk that others employed may not always do their duty. There has been some refining, sometimes becoming rather metaphysical, upon the subject of how far this

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community of employment extends, and who are fellow-servants. But the rule as laid down in the best sources of authority, and as we have usually followed it, is not one so much of personal as of occupational risk. There is no foundation for any doubt of the rule that every person must accept the natural risks of his employment. All precedents not absolutely binding on us should be tested by their conformity to this principle. They differ more or less on its application to particular cases or classes of facts. But we are bound to keep in sight the principle itself.

It is generally understood that the government and its agencies of all grades cannot properly be held responsible to persons in its employment who suffer injury from the neglect of any public body or agency. There is no difference in principle arising out of the relative rank of the agencies, and none has been generally recognized, although there may be anomalous decisions on this as on other subjects. There are some very safe employments, and some very perilous; but this has not made any difference. While governments cannot be sued, they generally provide in some way to meet such obligations as but for their official immunity might be made causes of action. Multitudes of cases must have arisen where persons in one branch of service have been killed or injured by reason of the wrong or neglect of those acting in other branches, but there has never been any recognition of such responsibility. Soldiers and sailors run other risks than those from the enemy or from exposure, or from other soldiers and sailors. Pensions are not always granted as liberally as they might be, but no one ever heard of a claim set up as a legal claim against the government for damages caused by official neglect or misconduct. There is no governmental agency, large or small, which does not have occasion at times to have work done for public purposes, or which does not have different classes of instrumentalities working separately in the general service.

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The Detroit fire department is a public instrumentality intended to secure protection against a great public danger. From time immemorial municipalities have been accustomed to have provision made against fire, and, although fire departments have sometimes been made up of volunteer members, their public character has been none the less recognized. The department, in whatever manner organized, is a distinct branch of the public service. In the case of the city of Detroit the Legislature have seen fit to remove it from the direct control of the city, and place it under a separate commission, governed by law, and not subject at all in the immediate government of the force by the will of the city legislature. Although in a certain sense it is sometimes called a city agency, yet its members are in no proper sense city agents, in the usual meaning of agency. Their duties are not powers delegated by the city, but powers conferred by the law of the State. They relate to matters which public policy requires should be placed in the list of municipal affairs, and which are often put entirely within the control of the governing body of the city. But they are of such importance that the immediate control has been thought proper to be removed from the other city authorities.

The board of public works has in like manner and for similar reasons been to some extent removed from absolute city control. It was held in *Detroit v. Blackeby*, 21 Mich. 84, that in the absence of statutes municipalities were not liable for the mere neglect of any public officers whose duties were conferred by law, and not by agency. The same rule had been applied in other cases in this State, and a distinction had existed between acts done for the municipality and by its procurement and cases of neglect or non-feasance. Within a few years municipalities have been made liable by statute for the care of their public ways in some cases, and so far as the statute goes the neglect is imputed to the city or township as its own fault in law. The statute creating

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this liability did so by expressly subjecting the officers to the discretion of the city authority. But whether liable or not to third persons for neglect of any of the municipal bodies, it has never been supposed that one municipal body could sue the city for the neglect or misconduct of another municipal body for acts or neglect which affects the interests in charge of either. If, for example, an engine should be injured by the fault of any of the several departments of city affairs, the fire commission could not sue the city for it.

There are more than possibilities that property in charge of any of the local bodies may be injured by the action of the others. A neglect of the water board may paralyze the fire department, as the firemen may do mischief to hydrants and water-pipes. Streets and sidewalks and lamp-posts have often been injured by the running and working of engines and fire apparatus. Firemen have been killed or disabled by things which were due more or less to municipal negligence. This is the first instance of an attempt to hold the city for it.

These instrumentalities form but one aggregate, and their relations are intimate and inseparable. Each, and the members of each, while acting in the performance of duty, are working in one common work. Each department has its own risks, and is bound, as far as may be, to guard against them. The duty of maintenance of public works in proper condition, where they are for public use, is for the benefit and convenience of the public, and not for that of the corporation itself. A city is under no duty to itself to keep streets in order for its own agencies or departments. The object of the statute giving damages for injuries on the streets was meant to protect the traveling public, and not the agencies of the municipality. While acting in the course of duty, each fireman is identified with his department. He has powers and privileges which private citizens do not possess, and he is bound to risks which others are not bound to run.

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The undisputed facts, moreover, show that the use of ordinary care would have prevented this accident. The plaintiff was driving at such a speed as would of itself make it impossible to prevent serious mischief from encountering any defect in the way, and this defect was so obvious that it could not possibly have escaped his notice if he had kept his eyes out on the road he was driving on. Had he been driving at a usual rate, the accident could not have occurred without the grossest negligence, and could not have done much mischief. But it would be going beyond all reason to hold that, if any liability exists in favor of a member of the fire department at all, the statutory liability which is created for the benefit of careful travelers can be made to reach cases where the furious driving is in itself a source of danger on any highway, and would render any accident likely to bring about serious results.

The judgment should be reversed, with costs of both courts, and, as plaintiff's own showing is against his recovery, no new trial should be granted.

SHERWOOD, C. J., concurred with CAMPBELL, J.

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The City of St. Ignace v. Simeon A. Snyder.

Criminal law—Municipal corporations—Ordinances and by-laws—Disorderly persons.

1. An ordinance declaring the keeper of a bawdy-house a "disorderly person" is not beyond the power of a city to enact, being within the statutory definition. How. Stat. § 1985.
2. A defendant prosecuted as a disorderly person can only complain of the charge in the warrant upon which he was tried and convicted, and the fact that in the ordinance under which he was prosecuted persons are defined and punished as disorderly for acts other than those with which he is charged, cannot invalidate it, so far as it relates to the act or acts for which he was convicted, even if some of those *other* acts are not recognized as disorderly under either the written or unwritten law of the State.
3. As to the *power* of a city to punish statutory felonies as misdemeanors when committed within its territorial jurisdiction, see *People v. Hanrahan*, *ante*, 611.

Error to Mackinac. (Steere, J.) Argued June 27, 1888. Decided July 11, 1889.

Defendant was convicted as a disorderly person under a city ordinance for keeping a bawdy-house, and sentenced to pay a fine of $100. Judgment affirmed. The facts are stated in the opinion.

P. N. Packard and *J. J. Brown*, for defendant.

Charles R. Brown and *Charles Conner*, for plaintiff.

Morse, J. Snyder was convicted in justice's court of being a disorderly person within the meaning of and contrary to the provisions of an ordinance of the city of St. Ignace, in this: That he kept a bawdy-house, a house of ill fame, an assignation house, a place for the resort of prostitutes and to which place common prostitutes resorted; and

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also that he was the proprietor and keeper of a disorderly bar-room, and a disorderly public house, room, and place, where drunken men and lewd women congregated and associated, and where they habitually met and associated, and there indulged in lewd, lascivious, vulgar, and obscene language and conduct, and where intoxicated and quarrelsome persons have been and remained, and engaged in personal encounters, quarrels, and fights, contrary to said ordinance, and against the peace and dignity of the people of the State of Michigan.

This ordinance was entitled "An ordinance in relation to disorderly persons," and was approved April 29, 1886.

Respondent claims that this ordinance is void for the following reasons:

1. It was not properly passed by the common council.
2. The common council of St. Ignace have no power, under the charter of said city, to extend the offenses that constitute disorderly conduct beyond what the common law and the general statutes of this State define as disorderly conduct.
3. It was not the intent of the Legislature to authorize the municipalities of this State to suspend the general laws of the State against crimes or misdemeanors, and to supersede them by village or city ordinances.
4. That the Legislature did not grant power to the city of St. Ignace to reduce indictable offenses under the general laws of this State to the lower grades of misdemeanors when committed within its territorial limits.

On appeal to the circuit court for the county of Mackinac the judgment of the justice was affirmed, and a fine of $100 imposed upon respondent, to be collected by execution, if not paid.

The proceedings of the common council in the passage of this ordinance do not appear in the record, and we are therefore unable to pass upon the first objection made to the validity of this ordinance.

It seems from the charge of the circuit judge to the jury that the issue presented to them on the trial was whether or

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not the respondent was, during the 60 days preceding September 7, 1886, the keeper of a bawdy-house, a house of ill fame, or house for the resort of common prostitutes. The ordinance reads as follows:

"AN ORDINANCE IN RELATION TO DISORDERLY PERSONS.

"*The City of St. Ignace ordains:*

"SECTION 1. All common prostitutes, all keepers of bawdy-houses, houses of ill fame, assignation houses, or houses or places for the resort of prostitutes, within said city; all persons, whether male or female, who shall lodge or remain in any house of ill fame in said city, or who shall visit the same, and there associate or consort with any prostitute; all persons who shall directly or indirectly solicit any person or persons in said city to visit any house of ill fame; all keepers, whether as owner, proprietor, or clerk, of disorderly saloons, bar-rooms, beer-halls, or other public or private house, room, or place; all persons who shall by threats, intimidation, or otherwise, and without lawful authority of law, interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer in the quiet and peaceable pursuit of his lawful vocation within said city; all persons who shall designedly make any open and indecent or obscene exposure of his or her person, or the person of another, or shall be guilty of gross lewdness and lascivious behavior; and all persons who shall be guilty of an assault, or of an assault and battery, within said city; and all vagrants within said city,—shall be deemed disorderly persons. Any person found within a house of ill fame shall be deemed, *prima facie*, a disorderly person.

"SECTION 2. Any person convicted of being a disorderly person, as specified in section one of this ordinance, shall be punished by a fine not exceeding one hundred dollars and costs of suit, or by imprisonment in the county jail not exceeding ninety days, or by both such fine and imprisonment, in the discretion of the court; and when a fine and costs only shall be imposed, the court may make a further or other sentence that the offender be committed to the county jail or city prison until said fine and costs shall be paid, for any period not exceeding thirty days."

The keeper of a bawdy-house, or house for the resort of prostitutes, is clearly defined as a "disorderly person" by

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the statute (How. Stat. § 1985), so that the ordinance in this respect has not gone outside of the statute law of this State in making such keeper a disorderly person.

The respondent can only complain of the count or charge in the warrant upon which he was tried and convicted. The balance of the complaint does not concern him here; and the fact that in the ordinance persons are defined and punished as disorderly for acts other than those with which he is charged, cannot invalidate it, so far as it relates to the act or acts for which he was convicted as a disorderly person, even if some of these other acts are not recognized as disorderly under either the written or unwritten law of the State. If any of such acts are within the second objection for this reason,—which we do not decide,—they are so separated in the ordinance from the acts which do not come under this objection that they could be expunged therefrom without invalidating the ordinance as a whole. *People v. Armstrong*, 72 Mich.——(41 N. W. Rep. 275).

The third and fourth objections to the validity of the ordinance are disposed of by the case of *People v. Hanrahan, ante*, 611.

We find no errors in the record, and the conviction is affirmed.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred.

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Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ACCOUNT—See EXECUTORS AND ADMINISTRATORS (3).

ACKNOWLEDGMENT—See CERTIFICATE OF ACKNOWLEDGMENT.

ACQUITTAL.

The acquittal of a defendant, prosecuted for the violation of a village ordinance by complaint and warrant pursuant to the general village incorporation law, cannot be reviewed. 603.

ACTION.

1. A suit to recover for the support of a pauper illegally removed from another state into this State, will not lie until after the pauper is adjudicated such, nor until expenses for such support have been paid, or the liability therefor incurred. 154 (2).
2. An action will lie for money had and received by a grantee on the sale of land conveyed to him under a *parol* trust to make such sale, and distribute the proceeds among the grantors. 414 (2).

ADDITIONAL EXPENSE.

The "additional expense" to be allowed a land-owner in a street-opening case is that naturally following such opening, like the removal of an existing fence, or the necessary expense of a railroad company, whose right of way is taken, in making the crossing safe, and providing guards against accidents, which "additional expense" must be real, tangible, and approximate. 455 (11).

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AFFIDAVIT.

An affidavit, describing the plaintiff as affiant, and to which the usual jurat, signed by the justice in his official character, is attached, is not *fatally* defective because not *signed* by the affiant. 305 (1).

AGENCY—See EVIDENCE (10, 13, 14); RATIFICATION.

AGRICULTURAL SOCIETY—See TAXES (6).

AMENDMENT—See DIVORCE (1); EQUITY PRACTICE (1).

APPEAL.

An appeal to the township board from proceedings to lay out a highway is a waiver of all defects not *jurisdictional*. 33 (3).

See ACQUITTAL; JUSTICES RETURN TO APPEAL (1, 2).

APPLICATION OF PAYMENTS.

A debtor may direct the application of a payment upon one of several debts, but if he fails so to do, the creditor may apply it upon whichever debt he pleases. 167 (1).

ASSESSMENTS—See MUTUAL FIRE INSURANCE COMPANIES (2-5).

ATTACHMENT SUIT.

A writ of attachment issued on the ground that the debt sued for was fraudulently contracted will be dissolved if it appears that a portion of said claim is not affected by such fraud. 219.

AUDITING CLAIMS—See MUNICIPAL CORPORATIONS (2).

BALLOT.

The requirement that school district officers shall be elected by ballot is *mandatory*. 143 (3).

BASTARDY PROCEEDINGS.

The liability of a surety on a recognizance for the appearance and answer of a respondent charged with bastardy cannot exceed that of his principal. 80.

BAWDY-HOUSE.

An ordinance declaring the keeper of a "bawdy-house" a disorderly person is not beyond the power of a city to enact, being within the statutory definition. 649 (1).

BILL OF EXCEPTIONS.

A bill of exceptions constructed in a connected narrative form, giving the testimony of each witness, and closing with the statement "and thereupon the defendants rested their case," will be presumed to contain all of the evidence bearing on the questions raised. 197 (3).

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BILLS AND NOTES.

An *agreement* to pay a fixed sum of money at a certain date, with 7 per cent. interest from date, and 8 per cent. interest after maturity, and 5 per cent. attorney's fees, without relief from homestead valuation or appraisement laws, to which is added a waiver by the makers and indorsers of presentment for payment, protest, and notice of protest and non-payment, with right to extend the time of payment, is *not* a promissory note. 546 (1).

See MORTGAGE (1, 3, 5, 6).

BOARD OF SUPERVISORS—See TAXES (6).

BODY EXECUTION.

The imprisonment of a defendant on a body execution issued on a judgment in a civil suit is a satisfaction of the debt, and his discharge by reason of the failure of the plaintiff, on demand, to pay the expenses of his board and keeping, will not revive the judgment. 542.

BOND.

A bond given by an outgoing city treasurer to his successor to secure the performance of an agreement between the two, pursuant to which the obligee became a condidate for said office and the obligor for mayor, who was to continue to perform all of the duties of treasurer, he being at the time a defaulter, which fact was unknown to the public, but was communicated to said obligee, cannot be held valid for any purpose. 260.

See LEVY ON EXEMPT PROPERTY (1, 2); LIQUOR TRAFFIC (5-8); REPLEVIN (4).

BOOKS OF ACCOUNT.

Statements made from books of account, in evidence without objection, showing the condition of the owner's business at a given date, are admissible in evidence in connection with the books. 188 (3).

BOUNDARY LINE—See LOCATION OF BOUNDARY LINE.

BREACH OF THE PEACE.

The use of foul, abusive, and insulting language in a dwelling-house, in the presence of the occupants, unaccompanied by threats, and causing no expectation or fear of personal violence, is *not* a breach of the peace within the common-law definition of that term. 483 (1).

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BRIDGES.

1. Act No. 62, Laws of 1889, providing for the construction of bridges over streams which form the boundary line between two townships, does not apply to a *navigable* river, over which it would be necessary to construct a *draw-bridge*, and maintain and manage the same during the season of navigation. 264 (1).
2. The duty of maintaining a draw-bridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw. *Id.* (2).
3. A general verdict for a plaintiff under Act 264, Laws of 1887, for damages sustained by reason of the defective condition of a bridge, will be sustained by evidence tending to show—

   a—That the bridge was 14 years old at the time of the accident, and that the stringers, a portion of which were produced before the jury and found to be rotten, were of a kind which, as situated, could not be expected to remain sound longer than six or eight years.

   b—That shortly before the accident the commissioner of highways of the township, and the overseer of the district, in which the bridge was situated, were notified that the same was out of repair, and the commissioner made no examination of the bridge, and the overseer caused it to be replanked, but put in no new stringers. 332 (6).
4. The following propositions contained in the charge of the court are indorsed as correct.

   a—It is the duty of a township, through its officers, to exercise reasonable supervision over its roads and bridges, and to see, within practicable limits, that they are kept in a reasonably safe condition for public travel.

   b—When it is generally known that a bridge has become decrepit, or when it has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed on the ground of want of *actual* notice of the dangerous infirmity.

   c—The measure of plaintiff's damages in case of recovery will be such an amount as will justly compensate him for the injury to the engine, and in this connection may be considered the cost of removing it from the creek, the making of reasonable repairs made necessary on account of injuries growing out of the fall, and its reduced value, if any, after such repairs from the value before the accident. *Id.* (7).

See DRAW-BRIDGE (1, 2); EVIDENCE (19).

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CAUSE OF ACTION.

The burden of showing a cause of action is always upon the plaintiff. 84 (2).

CERTIFICATE.

Statutory certificates of taxing officers cannot be contradicted in collateral proceedings. 181 (1).

CERTIFICATE OF ACKNOWLEDGMENT.

The words "signed, sealed, and acknowledged in my presence the day and year aforesaid," and signed "John J. Kaiting, Notary Public," falls short of any such certificate of acknowledgment, as has been held sufficient to make evidence. 247 (5).

CERTIORARI—See TRANSFER OF SUIT (2).

CHARGE TO JURY.

1. It is the office of the trial court to formulate the legal rules to guide the jury in the case before them with as little extraneous combination as possible. 81 (7).
2. The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called on to decide. *Id.* (8.)
3. An instruction to a jury in a negligence case that, if the plaintiff was guilty of that negligence without which the accident would not have occurred, she cannot recover, but if the defendant's servant *alone* was negligent, and *his* negligence occasioned the injury, she could recover, is equivalent to an instruction that the plaintiff must show that the *sole proximate* cause of the accident was the negligence of such servant. 92 (3).
4. Where, on the trial of a respondent for keeping a house of ill fame, a witness testifies to her calling a certain inmate "a pimp" or "her pimp," it is error for the court to determine which language was used, that being a question for the jury. 127 (2).
5. It is error for the court to point out particular testimony, and instruct the jury that, if they believe it, it is "pretty strong evidence" in favor of the guilt of the accused, without cautioning them not to be influenced by such opinion, and instructing them that they are the exclusive judges of the weight of the testimony, and of what facts it tends to establish. *Id.* (6).
6. The weight to be given to testimony, and all inferences to be drawn therefrom, is exclusively for the jury; and it is error

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CHARGE TO JURY.—Continued.
for the court to weigh the testimony for them, or draw inferences from it. 128 (7).
7. An instruction which, after referring to the testimony of two witnesses upon a given point, informs the jury that the testimony of one of them "very materially modifies that of the other," held prejudicial, and ground for reversal. 147 (2).
8. A statement that the case had been once tried, that the amount involved was not large, and that neither the parties nor county could afford to have the parties litigate forever, coupled with a wish that the jury might be able to arrive at a conclusion and settle the facts in the case, is simply an admonition to agree, which the court might very properly make. *Id.* (3).
9. The *presence* of a defendant at the trial of a suit involving his alleged fraudulent representations as to his financial condition, which charge he was at liberty to refute by his own testimony if untrue, and did not do so, is a fact patent to the jury, and an instruction by the court that the plaintiffs were entitled to this circumstance in their favor is not erroneous. 189 (4).
10. It is error for the court in his charge to the jury to assume as admitted, a controverted fact in the case. 592 (4).

CHATTEL MORTGAGE—See POSSESSION; EXECUTION.

CITY OF DETROIT.

Statutory duty to keeps streets in repair extends to members of fire department, between whom and the city the relation of master and servant does not exist. 628 (1, 2).

See MUNICIPAL CORPORATIONS (10–13).

CLAIMS—See MUNICIPAL CORPORATIONS (2).

COMMERCIAL AGENCIES.

It is the duty of a merchant who has furnished statements to commercial agencies of his financial standing for the purpose of gaining credit to give them notice of any material change for the worse, to the end that persons with whom he has commercial dealings may not be misled as to the extent of credit they may safely give him. 188 (2).

See EVIDENCE (10).

COMMON COUNTS—See PLEADING (2).

COMPROMISE.

Courts cannot disturb a compromise between parties, unless upon satisfactory evidence of mistake or fraud, or of an

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COMPROMISE.—Continued.
unconscionable advantage taken by one over the other. 346 (2).

CONDEMNATION PROCEEDINGS.
The statute in relation to taking land by municipalities in this State does not require any attempt to secure the same by dedication or sale prior to the commencement of condemnation proceedings, which negotiations need not be alleged in the petition; and said statute is not unconstitutional by reason of this omission. 455 (6).

See CONSTITUTIONAL LAW (3); STREET-OPENING CASE; DAMAGES.

CONDITIONAL SALE.
A vendor who retains the title on a sale of personal property until paid for makes such sale *absolute* by electing to take judgment against his vendee for the unpaid purchase money. 295 (1).

CONFESSIONS—See CRIMINAL LAW (10, 11).

CONFLICT OF JURISDICTION.
An order of an Iowa court for the removal of a pauper made pursuant to the statute of that state, will not protect the party executing it in violation of the laws of this State. 154 (1).

CONSENT DECREE—See EQUITY PRACTICE (2, 3); DIVORCE (2, 3).

CONSIDERATION.
1. A *verbal* promise to convey land in consideration of marriage is a sufficient *moral* obligation to make its fulfillment legal, except as against creditors. 435 (1).
2. A promise by a *third* party to pay the balance due on certain promissory notes must be based upon a sufficient consideration, which need not be expressed in the writing, but may be proved by any other legal evidence. 449 (1).
3. The admission of a valuable consideration in an agreement does not deprive the promisor of the right to prove what the consideration actually was. *Id.* (2).
4. Where the consideration for an agreement sued upon is the executory promise of the plaintiffs, they cannot recover without showing performance on their part. *Id.* (3).
5. Taking a discharged employé back into service at fixed wages, with a promise of steady employment, is a sufficient consideration for the release by the employé of a claim for damages for injuries received through the negligence of the employer prior

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CONSIDERATION.—Continued.
to such discharge; and if he is afterwards discharged without cause his remedy is upon said agreement. 550 (4).
See SEAL.

CONSTITUTIONAL LAW.
1. Act No. 267, Laws of 1887, in so far as it assumes to provide for a final decision of questions of fact in chancery suits by the verdict of a jury, and for the rejection of testimony by the presiding judge, as in a suit at law, is unconstitutional. 274 (2).
2. As it is not competetent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all the other State tribunals, no legislation which practically destroys it is valid. *Id.* (3).
3. Act No. 124, Laws of 1883, as amended by Act No. 48, Laws of 1887, is not unconstitutional in not providing for the payment for the land condemned before it is taken; and said statute, as a whole, provides for such a finding by the jury as the Constitution warrants. 454 (1).
See CRIMINAL LAW (21); MUNICIPAL COURTS; MUTUAL FIRE INSURANCE COMPANIES (1).

CONSTRUCTION OF CONTRACT.
The contract sued upon is construed to provide for the payment of the sum stipulated for therein, in case of the settlement of the pending suit for the infringement of the patent assigned to defendants' intestate, regardless of whether the condition of the title to said patent would permit of a successful prosecution of said suit to decree or not, and, the jury having found the fact of such settlement upon sufficient evidence, the judgment below is affirmed. 1.

CONTRACT.
Until a written contract becomes complete by the signatures of both parties agreeing to the same thing no one is bound, and the negotiations are open to proof. 100 (3).
See SPECIFIC PERFORMANCE; TIME OF PERFORMANCE.

CORPORATIONS.
1. In the absence of showing any such power, it cannot be presumed that a Michigan manufacturing company has corporate authority, or that its directors have implied authority, to organize companies in other states, and subject its *home* stockholders to liability for assessments and losses in such enterprises; and

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CORPORATIONS.—Continued.

certainly individual directors, not acting in any formal way, have no power to employ agents for any such purpose, or to stipulate expressly or impliedly for their compensation. 568 (1).

2. There is no implied power in corporate officers, not having special authority, to bind the company for the services of an employé. *Id.* (2).

3. While it is competent for a corporation to employ and pay a director or officer for *special* work, presumptively services rendered by a director for the *general* benefit are gratuitous, without some preliminary arrangement under which he acts. *Id.* (3).

See STOCKHOLDER.

COSTS.

In a suit by the receiver of a mutual fire insurance company organized under Act. No. 82, Laws of 1873, to recover an assessment, costs follow the judgment, regardless of its amount. 386 (6).

CREDIT—See EVIDENCE (10); COMMERCIAL AGENCIES.

CRIMINAL LAW.

PRELIMINARY EXAMINATION.

1. A justice is justified in holding a respondent for trial for an assault with intent to do great bodily harm less than murder, where there was testimony of a very serious bodily harm actually inflicted, and of express malice of an aggravated kind. 112 (1).

2. Where a justice of the peace, before whom a preliminary examination was held, made and entered on his docket all of the findings necessary to confer jurisdiction upon the circuit court if filed with the papers in the case as his return under the statute, a justice to whom such papers and docket are transferred has the right, and it is his legal duty, to certify the same to the circuit court, and an information may be filed thereon. 592 (1).

INFORMATION.

3. An information charging a druggist with the sale of liquor "*as a beverage*" is equivalent to charging that the liquor was sold "*to be used as a beverage.*" 587 (1).

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CRIMINAL LAW.—Continued.

TRIAL.

4. The withdrawal of a former prosecuting attorney from a criminal prosecution after arguing a motion to quash the information and asking a few questions of a witness, even if shown to be in the employ of private persons interested in the prosecution, saves any question under an objection made to his taking part in such prosecution. 592 (2).

EVIDENCE.

5. On the trial of a respondent for murder, it is competent for the people to show where he went after he had testified before the coroner's jury, and before his arrest. 21 (3).
6. In the absence of direct proof of the cause of death in a homicide case, if such fact can be accounted for upon any reasonable theory other than that of the respondent's guilt, the jury should acquit. *Id.* (4).
7. In a prosecution for the illegal sale of liquor, testimony that the party to whom the sale was made was seen on the same day and after such sale with a bottle containing whisky, which he said he obtained of the respondent, is irrelevant to the issue. 587 (2).
8. The deposition of a respondent taken on his preliminary examination, and not claimed *not* to contain *all* of his testimony, is the *best* evidence of what he testified to, and, if in court, is the *only* admissible evidence of that fact. *Id.* (3).
9. Where, on a trial of a respondent for forgery, the defense was that the note was drawn by the respondent and delivered to a third party, who returned it, purporting to be signed by the payor by her mark, and that respondent purchased it in good faith; and the payor denied signing the note, and testified that she could write,—it was error to permit her to write her name upon a piece of paper, and allow the prosecution to introduce the paper in evidence, for the purpose, as claimed, of showing that she could write, and that it was not necessary for her to make her mark. 592 (3).

CONFESSIONS.

10. *Prejudicial* statements or admissions made by a prisoner at a time and under circumstances well calculated to disturb his judgment and prudent action, and to unduly excite his fears, even if innocent, which conditions are the *natural* effect of

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CRIMINAL LAW.—Continued.
the course pursued by the officers in charge, are not admissible as evidence against him. 21 (1).
11. A statement made by a prisoner to a sheriff without question or suggestion on his part, and entirely of the prisoner's own offer, if material, is admissible as evidence on the trial. 127 (1).

SENTENCE.

12. On a conviction at the circuit of a crime triable by a justice, no greater punishment can be inflicted than could be imposed by the justice. 112 (2).
13. The limit of imprisonment by a justice is three months, and the imposition of a fine will not permit a longer sentence, wh ch, if imposed, is void for the *excess*. *Id.* (3).
14. A respondent convicted of conspiring to obtain the money of another by means of false pretenses may be sentenced under How. Stat. § 9434, which provides a punishment for the commission of offenses indictable at the common law for the punishment of which no provision is expressly made by any statute of this State. 582 (3).

MISCELLANEOUS.

15. In bastardy proceedings the liability of a surety cannot exceed that of his principal. 30.
16. Perjury is assignable upon an oath taken to a bill for divorce. 115 (1).
17. Where a bill for divorce contained sufficient allegations to give the court jurisdiction and to warrant the relief sought, if true, the fact that, upon trial of the complainant for perjury in swearing to said bill, it appeared that neither party had resided in this State for the *statutory year*, will not bar a conviction. *Id.* (3).
18. For general propositions relating to this subject, see *Ware v. Loveridge*, 488 (3).
19. Conspiracy to do an unlawful act was an indictable offense at the common law, and there never was any distinction between conspiracy to commit an act which was unlawful at the common law or one declared to be unlawful by statute, the *conspiracy* being the *gist* of the crime. 582 (4).
20. The acquittal of a defendant, prosecuted by complaint and warrant as in a criminal proceeding, for the violotion of a village ordinance, pursuant to the general law of this State

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CRIMINAL LAW.—Continued.

for the incorporation of villages, is beyond reach by any process of review. 603.

21. For a summary of many interesting propositions relating to the action of cities and villages in punishing offenses, and the right of the Legislature to confer such power, see *People v. Hanrahan*, 611 (2, 3).

See BASTARDY PROCEEDINGS; BREACH OF THE PEACE; DISORDERLY PERSONS (1, 2); MUNICIPAL COURTS.

DAMAGES.

1. Damages to the value of the land for farming purposes must be allowed to the owner before the public can acquire any rights in land taken for highway purposes. 33 (4).
2. In the absence of an ordinance requiring streets to be fenced, a property-owner through whose land one is opened is not charged with such a duty; and, in the absence of evidence showing the necessity for such fencing, the condemnation jury is not warranted in allowing the expense of such fencing as an item of damages. 455 (9).
3. The expense of clearing snow from sidewalks along a proposed city street is not a proper element of damage to be allowed the property owner through whose land it will pass, and a claim for the cost of grading and paving such street which might be assessed upon his adjoining property is also properly rejected. *Id.* (10).

See LIBEL AND SLANDER (3, 5); OFFICER; PLEADING (2); TRESPASS. (4).

DEED.

1. A land owner may convey land on condition that the title shall revert in case liquor is sold on the premises, but such condition will not be enforced if inserted to enable the grantor to obtain a monopoly of the prohibited business. 86 (1).
2. The consideration of a deed may be shown by parol. 414 (1).
3. Until a deed is delivered to the grantee to become *presently* operative, the grantor retains the right to rescind or recall it. 600 (1).

See CERTIFICATE OF ACKNOWLEDGMENT; SUBSCRIBING WITNESS.

DEFINITIONS.

Additional expense. 455 (11).
Necessity. 456 (12).

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DELIVERY.

1. Where articles are of that bulky nature that a symbolical delivery only can be made, and they are permitted to remain in a place where the possession may be equivocal, or what could not be said to be an actual possession, all doubts must be solved in favor of the purchaser or creditor, and against a mortgagee who has failed to file or renew his mortgage. 107 (2).
2. Until delivered to become presently operative a grantor may rescind or recall his deed. 600 (1).

DEPOSITIONS—See EVIDENCE (21).

DIRECTING VERDICT.

Where the court directs a verdict for a plaintiff, he must make out on the record a case that has no matter of fact left open. 100 (2).

DISORDERLY PERSONS.

1. An ordinance declaring the keeper of a bawdy-house a "disorderly person" is not beyond the power of a city to enact, being within the statutory definition. 649 (1).
2. A defendant prosecuted as a disorderly person can only complain of the charge in the warrant upon which he was tried and convicted, and the fact that in the ordinance under which he was prosecuted persons are defined and punished as disorderly for acts other than those with which he is charged, cannot invalidate it, so far as it relates to the act or acts for which he was convicted, even if some of those *other* acts are not recognized as disorderly under either the written or unwritten law of the State. *Id.* (2).

DISPOSITION OF PROPERTY.

While natural justice would seem to call for an equal division of property between children, yet the court cannot be insensible to the *absolute* right of a parent to dispose of his property in such manner as he sees fit, he being most capable of determining which of such children are most deserving, in his estimation; and the Court has no right to substitute its will or wishes, or ideas of what is just and right, for his. 53 (1).

DISSOLUTION OF ATTACHMENT—See ATTACHMENT SUIT.

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DIVORCE.

1. The residence of one of the parties to a bill for divorce in the county where the suit is brought is essential to granting the relief sought, but the omission of such averment from the bill may be cured by amendment. 115 (2).
2. A *consent* decree, made after the announcement by the court that a divorce would be granted, providing for such divorce and for the payment of a gross sum as alimony, "the same to be in full of all claims of the complainant against the defendant or his property," which payment has been made according to the terms of the decree, is a bar to any claim by the wife to dower. 256 (2).
3. An agreement by husband and wife, made in contemplation of a judicial separation, by which provision is made by the husband and agreed on by the wife to stand in lieu of dower and all other claims of the wife on her husband's estate, and which by mutual consent is made a part of a decree for divorce, is valid, and estops both parties to it. *Id.* (3)

See CRIMINAL LAW (17).

DOWER—See DIVORCE (2, 3).

DRAW-BRIDGE.

1. Act No. 62, Laws of 1889, does not apply to a *navigable* river, over which it would be necessary to construct and maintain a *draw-bridge*. 264 (1).
2. The duty of maintaining a draw-bridge over navigable waters includes the obligation to properly provide for the safe passage of vessels through the draw. *Id.* (2.)

DRUGGIST—See LIQUOR TRAFFIC (9).

ENCROACHMENT—See HIGHWAYS (5).

EQUITY—See INFANT (1, 2).

EQUITY JURISDICTION.

1. A bill making a case involving the consideration of trust relations, and averring fraudulent conduct upon the part of the defendant, gives the equity court jurisdiction. 17 (1).
2. For a full review and history of, see *Brown v. Buck*, 274 (4).

EQUITY PLEADING.

The omission of an averment of the *residence* of one of the parties to a bill for divorce in the *county* where it is filed may be cured by amendment. 115 (2).

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EQUITY PRACTICE.

1. In the exercise of a proper discretion, the court may permit a defendant on the trial to file an *unsworn* amended answer, setting up want of notice or knowledge of complainant's mortgage, an answer under oath being waived, and the amended pleading containing no admissions available to the complainant as evidence. Under such circumstances, the signature of the defendant was a mere formality, which could be dispensed with. 42 (4).
2. A consent decree cannot be appealed from. 256 (1).
3. Evidence is admissible to show the assent of a party to and understanding of a *consent* decree, not to vary the decree, but to show that it was not entered without his knowledge and approval. *Id.* (4.)
4. Where the testimony in a chancery suit is taken in open court, and no case has been settled under the statute, it must stand for hearing on appeal upon the pleadings, orders, files, and decree *alone*, and it will be presumed that there was evidence in the lower court to sustain the decree as made. 418.

ESTATES OF DECEASED PERSONS.

A (*solvent*) estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until he has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate evidence in some form of such facts. 163.

See TAXES (7, 8); WITNESS (2).

ESTOPPEL.

By electing to pursue one of two *inconsistent* remedies, the plaintiff is precluded from resorting to the other. 323 (4).

See TAXES (7, 8).

EVIDENCE.

1. In a suit to enforce a condition in a deed providing for the reversion of the title in case liquor is sold on the premises, evidence that the grantor is engaged in the same business, *in violation of law*, is a complete defense to the action. 36 (2).
2. The assent by a corporation to the sale of liquor by a firm, of which its *sole* business manager is a member, may be considered as evidence of a waiver of a condition for its non-sale attached to the sale of lands in the same village by said corporation. 37 (3).

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EVIDENCE.—Continued.

3. A court or jury would not be justified in finding a defendant liable for damages for the consequences of a sale of liquor upon a given day solely upon the testimony of a witness who testifies that he thinks he and the deceased did *not* go into the defendant's saloon on the day named, or get any liquor there, and that he was mistaken in his contrary statement made before the trial, or on a previous trial. 66 (2).
4. A plaintiff cannot ask for a verdict upon the uncorroborated evidence of a witness whom he has himself impeached. *Id.* (3).
5. The statement of a party as to the cause of an injury resulting in his death, not made at the time of the accident, nor necessary or pertinent for medical treatment, is inadmissible as evidence. 84 (1).
6. A plaintiff has always the burden of showing his cause of action, and a defendant is entitled to go free unless made answerable by legal testimony. There are no presumptions against him, and, if there is no such testimony to be found, it is not admissible to make out a case without it. *Id.* (2).
7. In a suit for damages for injuries claimed to have been received by reason of the careless and reckless driving of defendant's servant, his condition as to being drunk or sober at or about the time of the accident is a proper subject of inquiry. 92 (1).
8. In such a case the general character of the servant for sobriety is not in issue, and cannot be shown any more than his general character and reputation as a careful driver. *Id.* (2).
9. Evidence showing that a second mortgage was intended to be applied as a payment upon a prior one is admissible. 167 (2).
10. Copies of statements made by its agents to a commercial agency of what a merchant stated to them as to his financial standing, which were written down by them at the time, and which the testimony tends to show were subsequently approved of by the merchant, are admissible as evidence in favor of creditors who claim to have been defrauded by such representations. 188 (1).
11. Statements made by an accountant from account-books, in evidence without objection, showing, as claimed, the condition of the owner's business at a given date, are admissible in evidence in connection with said books. *Id.* (3).
12. The failure of a party to testify, who is charged with making fraudulent representations as to his financial standing, and,

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EVIDENCE.—Continued.

who is present on the trial, is a circumstance which the court may properly refer to in his charge to the jury. 189 (4).

13. In a suit involving the liability of the defendants for goods ordered by an *alleged* agent, orders drawn on other parties, and not in issue in said suit, nor shown to have been filled, nor recognized or paid by the defendants, are inadmissible to prove such agency. 197 (1).

14. The statements of an alleged agent as to his agency, made in a matter not connected with his principal, have no tendency to prove such agency. *Id.* (2).

15. Evidence is admissible to show the assent of a party to and understanding of a consent decree for divorce. 256 (4).

16. Oral evidence, not inconsistent with or contradictory of the record, is admissible to show what was litigated, and the grounds of the decision. 323 (2).

17. Where under an Indian treaty the selections of land were in writing, oral testimony of such fact is incompetent, in the absence of a legal excuse for the non-production of the writing or of a certified copy. 289 (2).

18. In an action of ejectment involving the identity of the patentee, a witness, who cannot identify the land in dispute with that he was on when he had a conversation with the occupant as to who selected the latter parcel, cannot testify to such conversation, in the absence of evidence of the identity of the two parcels. *Id.* (3).

19. In a suit for injuries received by reason of the defective condition of a bridge, evidence tending to show the existence of loose plank and rotten stringers a month prior to the accident is admissible. 438 (1).

20. It is not proper cross-examination of a physician, who has testified to the nature of injuries sustained by a plaintiff and the prospect of a full recovery, to ask him if he would be able to say from an examination of the plaintiff, if he had never seen him, that he was unable to do manual labor, said question being hardly proper for a medical expert. *Id.* (2).

21. A copy of a bill of sale attached to a deposition by the commissioner, pursuant to an interrogatory calling for the production of the original and the attachment of said copy, is competent evidence without the production of the original paper. 346 (1).

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EVIDENCE.—Continued.

22. In a suit on an agreement to pay the balance due on certain promissory notes, not exceeding a fixed sum, evidence of the failure of the plaintiffs to endeavor to collect the amount due by suit against the payor, before calling upon the defendant for payment, which oral agreement defendant testified was a part of the consideration for his agreement, is admissible, and does not tend to vary defendant's agreement. 449 (4).

23. Evidence of general knowledge and rumor among the employés of a street railway company that a car had been on the road ever since it was built is hearsay and irrelevant in a suit for injuries received by a passenger. 472 (3).

24. Proof of the general reputation of a horse, driven before a street-car, among the drivers and employés of the company, as unsafe and unreliable, is admissible as tending to show the negligence of the company in providing such an animal, and using it after the company knew or should have known the unfitness of the horse for the work. *Id.* (4).

25. In a suit against a street railway company for injuries received by a passenger, the testimony of a witness to a conversation between the driver and the superintendent, *after* the accident, in which the driver stated that he had reported the car as having a bad brake, etc., is inadmissible to bind the company with notice of the defect claimed. *Id.* (5).

26. Statements by a party as to the *manner* of his injury, not necessary to diagnose his case, cannot be given in evidence by an attending physician, any more than by a non-professional man. 499 (1).

27. It is not competent for counsel for plaintiff to show that plaintiff's memory has become impaired since meeting with the injury sued for, for the purpose of counteracting the damaging effect of his testimony, and forming a basis for an argument to the jury that he is mistaken in the same. *Id.* (7).

28. Where the testimony in a suit to recover the price of a machine tended to show that it was bought upon trial, and the defense set up was its failure to fill the warranty under which it was sold, testimony in support of such defense is admissible as against the vendors, or third parties to whom they had transferred a non-negotiable agreement for the payment of a part of the purchase price of the machine. 546 (2).

29. In a suit involving an alleged breach of warranty of a threshing separator, evidence of witnesses who were unacquainted with said machine, and had never seen it work, that separators

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EVIDENCE.—Continued.

made and sold by the same manufacturers, and of the same pattern and size as the one in question, worked well and gave good satisfaction, is inadmissible, having no tendency to show that the machine in controversy was properly constructed and did its work well. *Id.* (3).

See CONSIDERATION (2–4); LIBEL AND SLANDER (2, 4); TRESPASS (3, 5); WITNESS.

EXECUTION.

An officer has the right to take possession of chattel mortgaged property, and detain the same as against the mortgagee, for the time prescribed by law for bringing it to sale on his execution. 108 (3).

See BODY EXECUTION; HOMESTEAD (2, 3); LEVY ON EXEMPT PROPERTY.

EXECUTORS AND ADMINISTRATORS.

1. A (*solvent*) estate cannot be held to be fully settled, and the executor's duties closed, until he has paid the debts and legacies, and filed with the probate court proper evidence in some form of such facts. 163.
2. In suits by, the declaration must aver the promise to have been made to the deceased in his life-time to admit proof of that fact. 814.
3. While in cases of appeal by executors from the settlement of their final accounts the appellate court is to deal with such accounts in a spirit of equity, it must nevertheless have full material to act on, and must know precisely what was allowed or disallowed below, and cannot act on a new or different basis of fact. 431.

FIRE DEPARTMENT.

The members of the fire department of the city of Detroit are protected by the statute requiring the city to keep its streets in repair. 628 (1).

See MUTUAL FIRE INSURANCE COMPANIES.

FORECLOSURE SUIT—See MORTGAGE.

FOREIGN COURT.

The order of a court in another state for the removal of a pauper is no justification to the person who executes it in violation of the statutes of this State. 154 (1).

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FORFEITURE.

A *conviction* for a violation of the provisions of How. Stat. § 1776, forbidding the importation of paupers into this State, must *precede* a suit to recover the penalty imposed for its violation. 154 (3).

FORGERY—See LATOURETTE v. GARDNER, 184.

FRAUD.

1. A party defrauded must be vigilant in protecting himself, and prompt in complaining. 77 (1).
2. It would be contrary to all rules of propriety to assume, without proof, the existence of fraud, when if it existed it could be proved by a witness put on the stand as reliable by complainants, and not asked about it. *Id.* (2).
3. The concealment of or misrepresentation as to the real financial condition of a vendee need not be willful nor intended in order to constitute such fraud as will vitiate a sale made in reliance thereon. It is sufficient if they have the effect to defraud. 189 (5).
4. Statements by the survivor of two joint and several makers of a promissory note, upon which payments had been made by the *deceased* sufficient to bar the operation of the statute of limitations as to *his* estate, made to a proposed purchaser of the paper, to the effect that it was as good a note as he could make, and that it would be all right to purchase it, as he intended to pay it, the payor being ignorant of his statutory defense, are insufficient to warrant a recovery by the purchaser for fraud and deceit in inducing such purchase, he having been defeated in a suit on the note against said payor by the plea of the statute of limitations. 324 (5).

GARNISHMENT.

A justice of the peace is not authorized to render judgment in a garnishee suit, based *solely* upon an answer admitting an indebtedness upon a note overdue at time of garnishment, and which third parties claim to be *bona fide* purchasers of, before maturity *and for value*. 295 (2).

HIGHWAYS.

1. *Void* proceedings by a commissioner *discontinuing* a highway are not a bar to regular ones taken to widen it to the statutory width; which latter action is not *premature* by reason of the pendency of *certiorari* proceedings, in which the

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HIGHWAYS.—Continued.
invalidity of such discontinuance proceedings is established. 82 (2).
2. An appeal to the township board from proceedings to lay out or alter a highway is a waiver of such defects and irregularities as do not show a want of jurisdiction or that the proceedings were void. 83 (3).
3. Damages to the value of the land for farming purposes, taken by a commissioner of highways in laying out or altering a highway, must be allowed to the owner before the public can acquire any rights or interest in the property condemned. *Id.* (4).
4. Ten *full* days' notice of a meeting of the commissioner to determine the necessity of laying out a highway must be served upon the owners or occupants of the land through or adjoining which it is proposed to lay out said road. 225.
5. The intention of How. Stat. § 1873, providing for an action of trespass where an alleged encroachment *upon* or the existence *of* a highway is denied, is to have an exact conformity between the order for removal and the declaration, which pleading is intended to be in writing, and, if verbal, must be equally specific. 561 (1).
See BRIDGES.

HOMESTEAD.
1. A judgment for costs in favor of defendants, on the reversal of a judgment in favor of a plaintiff in an action sounding in tort, is subject to the statutory homestead exemption. 424 (1).
2. A wife can claim a homestead exemption in a farm owned by her, and upon which she lives with her husband, even though he is the head of the family, and manages the farm. *Id.* (2).
3. A wife can claim a homestead exemption in a farm on which she lives with her husband, who is the owner of the buildings and she of the land, as against *her* judgment creditors, to whom she gave notice of such claim, neither she nor her husband having made the statutory selection, and the husband making no different or adverse claim to that of the wife. *Id.* (3).

HOUSE OF ILL FAME.
1. The statute punishing the keeper of a house of ill fame is designed to prohibit the keeping and maintaining of houses which persons are permitted to frequent for the purpose of unlawful sexual intercourse. 128 (3).

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HOUSE OF ILL FAME.—Continued.

2. A single act of lewdness or prostitution will not constitute the offense of "keeping a house of ill fame," but, if the place where such act occurs is shown to be such a house, resorted to for such purpose, proof of such single act is sufficient upon this branch of the case. *Id.* (9).

3. Act No. 34, Laws of 1887, making the offense of keeping a house of ill fame a felony, and punishable as such, does not repeal by implication the provision of the charter of the city of Detroit authorizing the common council to prohibit, prevent, and suppress the keeping of such houses. 611 (1).

HUSBAND AND WIFE.

A man who is sane and intelligent cannot be held incapable of providing for his wife, whether wisely or unwisely. 435 (2).

See REPLEVIN (5).

IDEM SONANS.

The Indian names "Che-gaw-*ge*-quay" and "Che-gaw-*go*-quay" may be regarded as of the same sound. 289 (1).

IMPEACHMENT.

A verdict in favor of a plaintiff, based upon the uncorroborated evidence of a witness whom he has impeached, is unwarranted. 66 (3).

INDEMNITY—See LEVY ON EXEMPT PROPERTY.

INFANT.

1. An infant cannot ratify the purchase of land, after arriving at full age, by dealing with the title thus acquired as owner, without ratifying a mortgage given during his minority to secure a loan with which to pay off liens on the land which he had agreed to pay as a part of the purchase price. 204 (1).

2. Courts of equity will always view with special favor, and guard with jealous care, the rights of infants, but will not lend their aid to perpetrate wrongs upon innocent parties, nor aid in depriving them of their just rights. *Id.* (2).

INSURANCE—See MUTUAL FIRE INSURANCE COMPANIES.

INTERPRETER.

Jurors cannot be allowed to intervene as interpreters on the trial. 84 (3).

INTOXICATING LIQUORS—See LIQUOR TRAFFIC.

INTOXICATION.

The condition of a driver, as to being drunk or sober, is a proper

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INTOXICATION.—Continued.
subject of inquiry in a suit for damages, charged as the result of his reckless driving, but his *general* character for sobriety is not in issue. 92 (1, 2).

JUDGMENT.
A judgment for a defendant in a suit on a promissory note is not a bar to an action for fraud and deceit practiced on the plaintiff by said defendant to induce the purchase of the note. 323 (3).
See BODY EXECUTION; EXECUTION.

JUDICIAL NOTICE.
1. Words sometimes acquire a peculiar significance in a peculiar locality, but the court cannot take judicial notice of such fact. 127 (3).
2. Courts will take judicial notice of the ordinary meaning of English words, but not of uncommon or extraordinary meanings applied in isolated cases or in particular localities. *Id.* (4).

JURISDICTION.
A township board has no jurisdiction of questions involving the existence of a school-district, and the election of its officers. 143 (1).
See MUNICIPAL COURTS.

JURY.
1. Jurors cannot be allowed to intervene as interpreters of witnesses, and whatever goes to the jury must go to *all* through the same medium. 84 (3).
2. The *weight* to be given to testimony is for the jury, and it is their province to determine whether that of one witness overbalances that of another. 147 (1).
3. A final decision of questions of fact in a chancery suit cannot be left to a jury. 274 (2).
See NEGLIGENCE (3, 4, 5); QUESTIONS OF FACT.

JUSTICES OF THE PEACE—See MUNICIPAL COURTS.

JUSTICES RETURN TO APPEAL.
1. Where the return of a justice in an appeal case fails to show any jurisdiction over the defendant, or to set out a cause of action, the defendant, who did not plead below, is not bound to plead or make any defense at the circuit, and any judgment rendered against him is *fatally* defective on error, if not *void* on its face. 564 (1).

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JUSTICES RETURN TO APPEAL.—Continued.

2. A defendant, when appealing, has a right to rely upon the justice's return *as made*, and a change therein which vitally alters the situation of the parties cannot be made, except upon a proper application and showing, and an opportunity to be heard on the motion. *Id.* (2).

JUSTIFICATION.

The order of a court in another state for the removal of a pauper is no justification for the person who executes it in violation of the statutes of this State. 154 (1).

LAND CONTRACT.

1. The record of a mortgage executed by a vendee in a land contract, legally in possession, is constructive notice to a subsequent purchaser or incumbrancer of the *legal* title. 42 (1).
2. The purchase money is the *first* lien on land held under a land contract, and a mortgage given for a loan to pay such purchase price takes precedence of a prior recorded mortgage of the property. *Id.* (3).

LANDLORD AND TENANT.

A tenant who, with full knowledge of the dangerous condition of a stairway, which she had not used for over a year, voluntarily attempts to use it for a trivial purpose, cannot recover damages for the injuries sustained, nor will the landlord's failure to keep his promise to repair it warrant such recovery. 580.

LAW REPORTS.

Law reports should not be read by the court or by counsel to the jury. 84 (5).

See PRACTICE IN CIRCUIT COURTS (2).

LEVY ON EXEMPT PROPERTY.

1. A sheriff cannot demand indemnity for levying on exempt property, and is bound to know what his duty is in regard to any claim of exemption by the judgment debtor. 433 (1).
2. A bond reciting a levy on property claimed by other persons than the execution defendant, and conditioned to indemnify the officer for taking and selling goods and chattels which he or his assistants "shall judge to belong to the said adverse parties," is not ambiguous, and cannot be applied to anything beyond its terms. *Id.* (2).

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LIBEL AND SLANDER.

1. A communication to a newspaper, called out as an answer to a libelous article published against the party sending it, and not going beyond what was fairly to be expected of a man who might very well have been exasperated, instead of being good-naturedly contemptuous, will not support an action for libel. 272.
2. In an action for slander, the burden is upon the plaintiff to prove the utterance of the slanderous words *substantially* as charged in the declaration, but this rule does not exclude proof of the balance of the conversation. 403 (1).
3. The jury in a slander suit may consider in mitigation of damages evidence showing that the plaintiff provoked the defendant to utter the words charged as slanderous. *Id.* (2).
4. In actions for slander, where the words are not actionable *per se* the plaintiff must allege and prove that he has sustained some damages of a *pecuniary* nature, but, if actionable in themselves, no *special* damages need be alleged or proved, and the jury may give such damages as shall compensate the plaintiff for the wrong and injury done, the amount depending upon the circumstances of each case. *Id.* (3).
5. Under an allegation, in a declaration for slander, "that the said plaintiff is greatly injured in her good name, fame, credit, and reputation," punitive or exemplary damages may be awarded, if *express or wanton* malice is shown, and in case of *actual malice the jury may always* give such damages. *Id.* (4).

LICENSE FEE—See MUNICIPAL CORPORATIONS (7, 8, 9).

LIEN.

The purchase money is the first lien on land held under a land contract. 42 (3).

LIQUOR TRAFFIC.

1. The right of a grantor to convey land on condition that the grantee shall not sell liquor upon the premises, coupled with a provision that in case of such sale the land shall revert to the grantor, who shall at once take possession thereof, cannot be denied, and is within the public policy of this State (*Smith v. Barrie*, 56 Mich. 314; *Watrous v. Allen*, 57 Id. 362); but courts will not enforce such condition if inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business. 36 (1).
2. In an action of ejectment by a corporation to enforce such a

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LIQUOR TRAFFIC.—Continued.

condition, it is competent for the defendant to show that a firm, of which plaintiff's sole business manager is a member, is engaged in the unlawful sale of liquor as a beverage, to the knowledge of such manager, in the same village with defendant, from which facts, if proved, the jury would be justified in finding that the plaintiff acquiesced in such sales, and desired to secure a monopoly of the business, all of which would be a perfect defense to the action. *Id.* (2).

3. In such a case the fact that said firm was allowed to sell liquor without molestation, and with the assent or implied consent of plaintiff, would naturally be considered by the defendant as a waiver of the condition for its non-sale attached to the sale of lands in the village, and he would have a right to act upon such evidence of waiver until notified to the contrary. 37 (3).

4. It has not yet been determined in this State that one who sells or gives liquor *lawfully* to an *adult* person is responsible for his death or for injuries inflicted on account of his intoxication; and in all cases before this Court, where a recovery has been asked for under the statute, the sale was in violation of the statute. 66 (1).

5. A city is not liable for the willful refusal of its common council to approve of a liquor bond. 233.

6. The officers charged by statute with the approval or disapproval of liquor bonds act judicially within the scope and limit of the authority thus conferred, and cannot be made liable in a civil action for their refusal to approve such a bond, no matter how erroneous their determination may be. 234 (1).

7. A member of a city council is not precluded by the favorable report of the committee, to whom a liquor bond is referred; from investigating for himself, and, if the bond is put upon its passage upon such report, has not only the right, but it is his duty, to vote against its approval, if not satisfied that it meets the statutory requirements. *Id.* (2).

8. It is the duty of officers charged with the approval or disapproval of liquor bonds to see that said bonds, and the affidavits of the sureties therein, meet all of the statutory requirements applicable to such bonds and affidavits, and that the penalty is that fixed by the body of which such officers are members, and if, in their judgment, *each* surety is not worth said sum

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LIQUOR TRAFFIC.—Continued.

over and above the statutory deductions, it is their duty to disapprove the bond. *Id.* (3).

9. A druggist, acting in good faith in the sale of liquors, has a right to rely explicitly upon the statement made by the purchaser as to the *purpose* for which the liquor is to be applied, unless circumstances or facts known to him show such statement to be false, and are sufficient to satisfy such druggist, acting in good faith and in an honest endeavor to obey the law, that the purpose is not such as stated by the purchaser. The law does not require him to enter into an extended investigation, nor refuse to sell to a stranger without investigation and proof of the truth of his assertion of such purpose. 587 (4).

LOCATION OF BOUNDARY LINE.

The only question in dispute in this case was the location of a boundary line, and the decree of the court below fixing it is affirmed. 311.

LOTTERY.

There is no law of this State which prohibits or punishes a person from receiving a prize drawn in a lottery, if it is voluntarily paid to him. 582 (1).

MANDAMUS.

1. *Mandamus* is a proper remedy to compel an *original* hearing in a chancery suit. 274 (1).
2. In applications for *mandamus*, the Court must rely upon the facts set up in the answer of the respondent. 360 (3).
3. *Mandamus* will not lie to compel a circuit judge to try an information for an alleged "breach of the peace," charged to have been committed by the use of foul, abusive, and insulting language in a dwelling-house, in the presence of the occupants, but accompanied with no threat, and causing no expectation or fear of personal violence. 488 (2).

MARRIED WOMAN.

The promise of a married woman to pay for medical services rendered to her husband is not binding, it not being a contract relating to or benefiting her separate estate. 397 (2).

See REPLEVIN (5).

MASTER AND SERVANT.

The relation of master and servant does not exist between the city of Detroit and members of its fire department. 628 (2).

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MISNOMER.

A man sued by actual service of process, under a name which he is called by and known, may be held upon a judgment under that name. 437.

MONEY HAD AND RECEIVED—See ACTION.

MONOPOLY.

A condition in a deed for the reversion of the title, in case the sale of liquor is carried on upon the premises, cannot be enforced if designed to give to the grantor a monopoly of the prohibited business. 86 (1).

MORTGAGE.

1. A foreclosure bill filed by an assignee who claims to be the owner of *one* of *four* mortgage notes should account for the remaining notes, but, if their payment is shown on the hearing, the defect, as one of pleading, may be disregarded. 247 (1).
2. The failure of a complainant in a foreclosure suit to make out a complete title to the mortgage as a *valid* security will bar relief in the equity court. *Id.* (2).
3. The burden of proof is upon the complainants in a foreclosure suit, prosecuted by them as alleged *bona fide* holders of the mortgage, to establish *such* fact, where it is conceded that it would be fraudulent for their assignor to make any claim to the mortgage note, which he should have delivered up to the maker. *Id.* (3).
4. A mortgagor of a mortgage may at any time require a retransfer upon satisfying the secured debt. *Id.* (6).
5. A foreclosure bill filed by an assignee whose assignment shows upon its face that it is not *absolute* should set forth the *existence* and *amount* of the notes to secure which he holds it, and the assignor should be made a party to the suit. *Id.* (7).
6. While it has been held that an *innocent* indorsee of a negotiable mortgage note takes the same title to the mortgage as to the note, yet this is because the two papers are bound together by such references as identify the one as collateral to the other; and it is not clear that said rule applies when he can only show his right to enforce the mortgage *at all* by *parol* evidence of extrinsic facts. *Id.* (8).
7. Generally speaking, every assignee of a mortgage takes it subject to existing equities, and no purchaser can safely rely on inquiry made of his assignor alone, but if inquiry becomes necessary resort must usually be had to the debtor also. 248 (9).

See LATOURETTE V. GARDNER, 134.

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MUNICIPAL CORPORATIONS.

1. A city is not liable for the willful refusal of its common council to approve of a liquor bond pursuant to the statute of this State. 228.

2. A statute providing that all claims against a city shall be audited and allowed by the common council, and that the failure to present such claims, properly itemized and verified, shall be a sufficient defense in a suit for their recovery, does not apply to a claim for damages for a personal injury sustained by reason of the negligence of the city, but to claims arising out of contract, or for injury to property, where the amount claimed may be computed, after the facts are established, by some fixed rules or mode of computation. 438 (3).

3. The *individual* knowledge of officers or agents of a municipal corporation, who in such capacity have powers or duties conferred upon them with reference to a given matter, is the knowledge of the corporation, and notice to them is notice to the corporation, which is bound by such knowledge or notice. 499 (2).

4. Where the liability of a municipal corporation is statutory, it must depend upon a true interpretation of the statute creating it. *Id.* (3).

5. A municipal corporation is only chargeable with notice or knowledge of the *particular* defect in a street or sidewalk causing the injury complained of. *Id.* (4).

6. A city cannot be held liable for damages caused by the non-repair of a cross-walk on a particular street by showing that sidewalks in the vicinity were out of repair. *Id.* (5).

7. The law will not allow the right of property or business to be invaded under the guise of a police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law. 527 (1).

8. Where, under its charter, a village has the right to exact a license fee as compensation for the expense of the supervision of a lawful business or trade carried on therein, the exaction of a fee of $10 per month is excessive and unreasonable, and therefore void. *Id.* (2).

9. An ordinance of a village requiring the payment of a license fee of $10 per month for the privilege of selling fresh meat on the village streets, in less quantities than one-quarter of the

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MUNICIPAL CORPORATIONS.—Continued.

slaughtered animal, is in restraint of trade, and not within the legislative power of the village to enact. *Id.* (3).

10. A city has no right, and the city (of Detroit) has never been empowered, to shut out the producers of fresh provisions and similar farm and garden articles from having convenient access to consumers. 574 (1).

11. The amendment to section 11 of chapter 66 of the ordinances of the city of Detroit, adopted April 5, 1889, prohibiting sales of any articles on the Central market except from stalls or stands leased or occupied by the sellers, and confining farmers and gardeners with their vehicles to the Cass and hay markets, is void. *Id.* (2).

12. The charter of the city of Detroit confers full authority upon the common council to pass and enforce ordinances to prohibit and prevent incumbering of streets, and obstructions to public travel over the streets and public places in the city, by vehicles or otherwise, *outside* of the market limits. *Id.* (3).

13. The *statutory* duty imposed upon the city of Detroit to keep its streets in repair, and reasonably safe and fit for the public travel, extends to members of the fire department, the same as to others of the traveling public. 628 (1).

See STREET-OPENING CASE.

MUNICIPAL COURTS.

It is competent for the Legislature to vest in the police court of a city exclusive jurisdiction to hear, try, and determine all criminal cases triable by a justice of the peace, where the offense charged was committed within the corporate limits of the city. 578.

MUTUAL FIRE INSURANCE COMPANIES.

1. A title to an act which reads, "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," is sufficient to embrace, without particular mention, provisions for winding them up in case they neglect to perform their duties or exercise their powers, and embraces in the object expressed examinations by the Commissioner of Insurance, the appointment of a receiver, and the assessment of policy-holders to pay liabilities and expenses. 385 (1).

2. A receiver of a fire insurance company organized under Act No. 82, Laws of 1873, derives his authority to make assessments directly from the statute, and, while proper to ask the advice of the court, of which he is an officer, on an *ex parte*

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MUTUAL FIRE INSURANCE COMPANIES.—Continued.

petition, the order obtained confers no additional authority, and, if he acts beyond or in contravention of the statute, his acts may be questioned the same as if no such order had been made. *Id.* (2).

3. Such assessments are not conclusive upon the members, and in a suit to recover same the statute makes the assessment *prima facie* evidence of the regularity and correctness of all proceedings, and of a right of recovery. *Id.* (3).

4. The underlying principle of *all* insurance is *complete* indemnity for all losses insured against, and is as applicable to *mutual* as to *stock* companies; the object of the statute authorizing the formation of the former being to substitute mutual responsibility for capital, and to limit the *price* of insurance to the actual cost of indemnity against *all* the risks of *all* of the members. *Id.* (4).

5. Parties taking insurance in a mutual company are presumed to do so with a full understanding of all the liabilities they assume by so doing, including that of making good deficiencies arising by reason of the non-payment of assessments by irresponsible members, or from other causes; and it is proper and necessary for a receiver of such company to assess, in the first instance, a sufficient sum to pay all liabilities and expenses, and in ascertaining this amount he is invested with a liberal discretion, which will not be interfered with unless abused; and the Court cannot say that an assessment of 100 per cent. in excess of the liabilities is not warranted, and made in good faith, without evidence that it is *unreasonable* and *excessive*. *Id.* (5).

MUTUAL PROMISES—See PLEADING (1).

NECESSITY.

The charge of the court defining the word "necessity" is held not erroneous nor misleading. 456 (12).

NEGLIGENCE.

1. Where, in an action for negligence, the accident and resulting injury are alleged as having been caused by several *concurring* negligent acts and omissions of the defendant, *each* element of negligence must be proved to warrant a recovery. 473 (1).

2. A street railway company is not required to furnish its road with *new* cars, nor is it liable for using *old* ones, but, in *either*

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NEGLIGENCE.—Continued.
case, must keep them in good repair, and fit for use, so as not to endanger the safety of passengers. *Id.* (2).
3. Where, in a negligence case, the defect causing the injury complained of is in the walk itself, prepared and provided for the use of pedestrians, and the accident happened in the night-time, and while pursuing the ordinary traveled way, the question of the plaintiff's care should be submitted to the jury as a question of fact. 499 (6).
4. A wild bull, two and one-half years old, is a dangerous animal to be driven in the street, and in a suit for injuries received from such animal it is for the jury to say whether such driving with the animal's head tied to one foot, after notice that it would be safer to lead him by a ring in his nose, and with knowledge of his wildness and the nature of such an animal, was negligence. 557 (1).
5. The *fact* that a bull has never attacked any one prior to the injury sued for will not bar a recovery, but is a circumstance to be considered by the jury as bearing upon the question of the defendants' negligence. *Id.* (2).
6. The *fact* that a bull was never actually vicious up to the time of his attack upon the plaintiff, and that the person *then* driving him had no knowledge of such viciousness, will not bar a recovery if the manner of driving and managing the animal was negligent. *Id.* (3).
See CHARGE TO JURY (3, 6, 7, 8, 10); LANDLORD AND TENANT.

NEW TRIAL.
1. The granting of a new trial rests in the discretion of the trial court, which, if not abused, cannot be interfered with by the Supreme Court. 360 (1).
2. To warrant such interference, the abuse ought to be so plain that, upon consideration of the facts upon which the trial judge acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. *Id.* (2).
3. The fact that a judgment is obtained for or against a party who moves for a new trial has no bearing upon the question whether the judge has abused his discretion in granting or denying the motion. *Id.* (4).

NOTICE.
1. The record of a mortgage executed by a contract purchaser of land, who has gone into possession under an agreement with

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NOTICE.—Continued.

the vendor, is constructive notice to a subsequent purchaser or incumbancer of the *legal* title. 42 (1).

2. A notice of the countermand of an order for printed matter by a publisher, pursuant to a right reserved in the order in case of a sale of his paper by a given date, given on the supposition that such sale had been made, but which failed for want of a legal formality, and which notified the other party to incur no expenses, is sufficient to end the arrangement. 100 (4).

3. Ten full days' notice of a meeting to lay out a highway must be served upon the parties interested. 225.

4. Whatever fairly puts a party upon inquiry is sufficient notice, where the *means* of knowledge are at hand, and the omission to make such inquiry charges him with (knowledge of) all the facts which by a proper inquiry he might have ascertained. 332 (4).

5. "A person is chargeable with constructive notice where, having the means of knowledge, he does not use them." *Id.* (5).

See MUNICIPAL CORPORATIONS (3, 5); NOTICE OF TITLE.

NOTICE OF TITLE.

A notice of title in an action of trespass to lands in justice's court, which states that the land on which the injuries complained of were committed was a legal highway, and that defendant in removing the fence of the plaintiff was acting as highway commissioner under the statute, but which does not describe *all* of the land claimed to have been trespassed upon, is sufficient to apprise the plaintiff of the nature of the defense, and under which all pertinent testimony may be admitted. 32 (1).

OFFICER.

The willful violation of a plain duty by an officer acting in a *ministerial* capacity will not subject him to a suit for damages if the party affected thereby has sustained no injury by such misconduct. 234 (4).

See LEVY ON EXEMPT PROPERTY.

PARENT AND CHILD—See DISPOSITION OF PROPERTY.

PAYMENT.

1. A debtor owing two or more debts to a creditor, to whom he makes a payment, may direct its application, but in the

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PAYMENT.—Continued.
absence of such direction the creditor may apply the payment upon whichever debt he pleases. 167 (1).
2. Payment may be made in any mode which the parties agree shall be treated as the equivalent of a money payment. *Id.* (4).

PAUPERS.
1. An order of an Iowa court made pursuant to its statute, directing the removal of a pauper, who has not gained a legal settlement in that state, to Michigan, her former place of residence, is no justification to the person who executes it, if such removal is in violation of the statutes of this State. 154 (1).
2. A suit to recover for the support of a pauper illegally removed from another state into a county in Michigan is properly brought in the name of the superintendents of the poor of the county, but will not lie until after the pauper is adjudicated such, nor until expenses for such support have been paid, or the liability therefor incurred, by such superintendents. *Id.* (2).
3. A conviction for a violation of the provisions of How. Stat. § 1776, must precede a suit to recover the forfeiture of $50 provided for in said section, and until the defendant is so convicted, and required to indemnify the county against liability for the pauper's support in case he fails to remove the pauper from the State, he is under no obligation to give said bond, nor will a suit lie against him for such non-removal. *Id.* (3).
See SUPERINTENDENTS OF THE POOR.

PERFORMANCE—See CONSIDERATION; TIME OF PERFORMANCE (4).

PERJURY—See CRIMINAL LAW (17).

PETITION—See SIGNING PETITION; VERIFYING PETITION; TRANSFER OF SUIT (1).

PIMP.
The word "pimp" is not a technical one, nor has it acquired any peculiar or appropriate meaning in the law, and is therefore to be construed and understood according to the common and approved usage of the language. How. Stat. § 2. 127 (5).

PLEADING.
1. Where the consideration of a contract is executory, the plaintiff is required to state it in his declaration with a greater degree of certainty and minuteness than in the case of an

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PLEADING.—Continued.

executed one, to enable the court to judge whether the performance alleged is sufficient; and in the case of mutual promises made upon the strength of concurrent considerations, such promises must be alleged to have been concurrent or obligatory upon both parties at the same time. 213 (1).

2. Damages for the non-performance of an unrescinded contract, not conditioned for the payment of money,—the undertakings of plaintiff not being fully performed, and his damages arising from his not being permitted to perform them,—cannot be recovered upon the common counts by averring performance. *Id.* (2).

3. In a suit by executors, the declaration must aver the promise to have been made to their testator in his life-time to admit proof of that fact. 314.

See HIGHWAYS (5); LIBEL AND SLANDER (2, 4, 5); NOTICE OF TITLE; TIME OF PERFORMANCE (2).

POLICE COURT—See MUNICIPAL COURTS.

POSSESSION.

A debtor mortgaged certain hotel furniture to secure an indorser, who assigned the mortgage to a bank as security for the payment of the notes, which mortgage was filed, but lasped for want of renewal. The mortgagor leased the furniture, and assigned the lease to the bank, to which the rent was to be paid, and an inventory was taken and delivered to the bank, and it was agreed that the bank should take possession of the property; but none of it was moved, nor was the lessee disturbed in his possession, which he held until a judgment creditor of the owner levied on the furniture, when the bank brought replevin.

Held, that there was no such actual and continued change of possession as would dispense with the renewal of the mortgage, or effect that of the lessee, and that the bank could not maintain replevin for the property. 107 (1).

PRACTICE IN CIRCUIT COURTS.

1. Whatever difficulties arise on a trial in getting testimony out of ignorant or stubborn witnesses can be best dealt with by leaving all parties to the usual methods. 84 (4).

2. It is no more correct for the court than for counsel to read law reports to the jury. *Id.* (5).

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PRACTICE IN CIRCUIT COURTS.—Continued.

3. Precedents are for the use of courts, who are supposed competent to extract principles, and not for juries, who cannot be expected to discriminate in their use. *Id.* (6).

4. If the facts found entitle a party to a judgment, the giving of *wrong* reasons for reaching that result is immaterial. 828 (1).

See NEW TRIAL; LAW REPORTS.

PRACTICE IN SUPREME COURT—See EQUITY PRACTICE (4).

PRECEDENTS.

Precedents are for the use of the courts and not for juries. 84 (6).

PRESUMPTIONS.

No presumptions obtain against a defendant. 84 (2).

PRINCIPAL AND AGENT—See EVIDENCE (10, 13, 14); RATIFICATION.

PROMISSORY NOTE—See BILLS AND NOTES; MORTGAGE (1, 3, 5, 6).

PUBLIC MARKETS—See MUNICIPAL CORPORATIONS (10, 11, 12).

PUBLIC OFFICERS—See BOND.

PUBLIC POLICY.

1. The conveyance of land on condition that the title shall revert in case liquor is sold on the premises is within the public policy of this State. 36 (1).

2. Public policy requires that courts should lend active aid in punishing persons who conspire to obtain money or any other valuable thing by means of false pretenses, with intent to cheat or defraud, and in no case should crime be effectually interposed as a shield for crime. 582 (2).

See BOND.

PURCHASE MONEY.

The purchase money is the *first* lien on land held under a land contract. 42 (3).

QUESTIONS OF FACT.

The controversy in this case resolves itself into a question of veracity and the weight the jury should give to the conflicting testimony, and the questions of fact were submitted to the jury, who were correctly instructed as to the law. 309.

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QUO WARRANTO.

1. The writ of *quo warranto* is a proper remedy where not only the existence of a school-district, but the title of its officers, is attacked, these questions being judicial in their nature, and not within the jurisdiction of the township board. 143 (1).
2. Where school-district officers were unanimously chosen by a *viva voce* vote at a meeting regularly called, and qualified and were acting as such at the time of the institution of *quo warranto* proceedings in the interest of the public, no other persons claiming to have been elected, the Court reversed a judgment of ouster and dismissed the writ. *Id.* (4).

RATIFICATION.

1. An agent, in order to ratify the unauthorized act of another agent, must have general power to perform the act which he ratifies, and both must be agents of the same principal, and the agent whose act is in question must have professed to act as the agent of such common principal. 197 (4).
2. An unauthorized act of a stranger may be ratified by the party for whom he assumes to act, but not by his general agent, unless the power of appointing agents has been delegated to such agent. *Id.* (5).

See INFANT.

RECEIVER—See MUTUAL FIRE INSURANCE COMPANIES.

RECOGNIZANCE.

The liability of a surety in a bastardy case is measured by that of his principal. 80.

RECORDING LAWS.

1. The record of a mortgage executed by a contract purchaser of land, who has gone into possession under an agreement with the vendors, is *constructive* notice to a subsequent purchaser or incumbrancer of the *legal* title. 42 (1).
2. Our statutes contemplate that any instrument entitled to be recorded shall *first* be entered in the entry book, *when* it is deemed recorded. *Id.* (2).
3. The purchase money is the first lien on land held under a land contract, and a mortgage given as security for money advanced to pay such purchase price takes precedence of a prior recorded mortgage of said property. *Id.* (3).

REMEDY AT LAW—See EQUITY JURISDICTION (1).

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REPEAL.

The enactment of a statute making the keeping of a house of ill fame a felony, does not repeal ordinances punishing it as a lessor offense. 611 (1).

See STATUTES.

REPLEVIN.

1. On an assessment of damages in a replevin suit, on waiver of a return of the property, the *true* condition of the title may be shown. 286 (1).
2. On an assessment in a replevin suit, on a waiver of a return of the property, all questions concerning the amount recoverable by the defendant must be settled, which assessment becomes the conclusive measure of liability in a suit on the bond. *Id.* (2).
3. An affidavit in replevin, describing the plaintiff as affiant, and to which the usual jurat, signed by the justice in his official character, is attached, is not *fatally* defective because not *signed* by such affiant. 305 (1).
4. A defendant in replevin waives the statutory provision for judgment in his favor, on failure of the plaintiff to *forthwith* file a new bond where the original one is defective, by going to trial on the merits without raising such objection. *Id.* (2).
5. Where a married woman included in a bill of sale of property belonging to her husband certain of her own property, under the mistaken idea of thus protecting it from her husband's creditors, which fact was known to the vendee, who paid no consideration for said property, she can recover the same, after demand and refusal, in an action of replevin. *Id.* (3).

REPRESENTATIONS TO OBTAIN CREDIT—See EVIDENCE (10, 12); COMMERCIAL AGENCIES.

RESCISSION OF CONTRACT—See NOTICE (2).

RESIDENCE—See DIVORCE (1).

RES JUDICATA.

Oral evidence, not inconsistent with or contradictory of the record, is admissible to show what was litigated, and the grounds of a former decision. 323 (2).

RESTRAINT OF TRADE—See MUNICIPAL CORPORATIONS (7-11).

RETURN.

A return by a tax collector of his inability to find personal property to satisfy the tax, is a condition precedent to a valid sale of the land assessed. 181 (2).

See JUSTICES RETURN TO APPEAL.

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SATISFACTION OF JUDGMENT—See BODY EXECUTION.

SCHOOLS AND SCHOOL-DISTRICTS.

1. How. Stat. § 5033, limiting school-districts to nine sections of land, means an *acreage* equal to nine full sections according to the United States survey. 143 (2).
2. The provisions of law relative to the election of school-district officers by *ballot* are mandatory. *Id.* (3).

See QUO WARRANTO.

SEAL.

1. A seal imports a consideration, and is *prima facie* evidence of it, but the validity of the instrument may be attacked for fraud, mistake, surprise, duress, or for a *total* want of consideration. 550 (1).
2. The rule created by statute that sealed instruments may be impeached for want of consideration applies with equal force to *all* sealed instruments between party and party. *Id.* (2).

SENTENCE.

1. A sentence in the circuit court, on a conviction of an offense triable by a justice, cannot exceed the term which the justice could impose. 112 (2).
2. The imposition of a fine, in addition to imprisonment, will not authorize a justice to impose a longer sentence than three months, such *excess* being void. *Id.* (3).

SETTLEMENT—See COMPROMISE.

SIDEWALKS—See MUNICIPAL CORPORATIONS (5, 6).

SIGNING PETITION.

A petition signed "The City of Detroit, by William S. Sheeran, City Attorney," is a sufficient compliance with a statute requiring it to be signed by said attorney in his official capacity. 455 (4).

SLANDER—See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

A party who seeks to enforce the specific performance of a contract is called upon to make out a *plain* case, and establish it by his proofs. 535.

STATUTES.

1. Act No. 62, Laws of 1889, held not to apply to a navigable river over which it is necessary to construct a draw-bridge. 264.

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STATUTES.—Continued.

2. Act No. 267, Laws of 1887, in so far as it assumes to provide for a final decision of questions of fact in chancery suits by the verdict of a jury, and for the rejection of testimony by the presiding judge, as in a suit at law, is unconstitutional. 274 (2).
3. A repealing statute, containing no saving clause, which *substantially* re-enact the law repealed, does not affect a pending suit brought under the original act. 332 (1).
4. The act repealed is often an aid in the construction of the repealing act. *Id.* (2).
5. Act No. 456, Local Acts of 1887, authorizing circuit judges of Wayne county to act as judges of recorder's court, is constitutional, as far as it affects causes of which the circuit court had original jurisdiction before the passage of the act. 512 (7, 8).

See MUNICIPAL CORPORATIONS (13).

STATUTE OF FRAUDS.

1. A parol agreement by one tenant in common of land for its sale by his co-tenant in the joint interest, which has been fully executed, and the interest of such tenant converted into money and received by the co-tenant, is not within the statute of frauds. 17 (2).
2. The *verbal* promise of a widow to pay a physician's bill against her husband is void under the statute of frauds. 397 (3).
3. A *verbal* agreement, based upon a good consideration, to furnish steady employment to a discharged employé for no *definite* time, is valid for one year at least. 530 (3).

STATUTE OF LIMITATIONS.

The indorsement by a mortgagee of a second mortgage, executed by the mortgagor and another, as a payment upon the first mortgage, under an agreement that it should be so treated, comes within the provisions of How. Stat. § 8729, and saves the debt from the operation of the statute of limitations. 167 (3).

STOCKHOLDER.

A subscriber to the capital stock of a manufacturing company, which never had a stock-transfer book or record, under an agreement with its principal stockholder and president that he would pay for the subscription, which he did, and with the right to take the stock at any time within one year on payment to him in labor of 50 per cent. of its par value, but to whom no certificate of stock was ever issued, and who within

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STOCKHOLDER.—Continued.

three months after so subscribing notified said president that he would not take said stock, to which that officer assented, and said subscriber never acted or was regarded as a stockholder, or received any benefit as such, nor paid anything for the stock, is *not* a stockholder of said corporation. 534.

STREETS.

The statutory duty of the city of Detroit to keep its streets in repair extends to members of the fire department. 628 (1).

See MUNICIPAL CORPORATIONS (13).

STREET EXTENSION.

A variation of a few degrees in extending a street from its course is not prohibited by law, and is within the discretion of a city, if ratified by the finding of the jury that such course is necessary. 455 (8).

STREET-OPENING CASE.

1. In a street-opening case the jury are not precluded from estimating and determining the whole cost of the improvement before they find the necessity for it, and the compensation of the individual owners is to be apportioned afterwards, as a natural sequence. 454 (2).
2. Under a statute providing that the jury in a street-opening case must "ascertain and determine whether there is necessity for taking (the land) for the use or benefit of the public," in order to find such necessity, the jury must determine that the *benefit* to the public will be equal to the *cost* of the improvement, which finding renders the question of local benefits entirely immaterial and irrelevant, as far as the necessity of the improvement is concerned. *Id.* (3).
3. A petition stating that the object of a proposed public improvement is the opening and extending of a designated street between two streets, where not already opened, to a certain width, and that, in making and maintaining the proposed improvement, a perpetual right of way over the different pieces or parcels of private property described in the petition will be necessary, and that such right of way is proposed to be used for the purposes of a public street and highway, states fully enough, in "a general way," the nature and extent of the *use* of the land that will be required in making and maintaining the proposed improvement. 455 (7).

STREET RAILWAY COMPANY—See NEGLIGENCE; EVIDENCE.

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SUBSCRIBING WITNESS.

The testimony of a subscribing witness that he did not see the instrument executed, but signed as such witness because he knew the handwriting of the party executing it, destroys his character as such witness. 247 (4).

SUPERINTENDENTS OF THE POOR.

The superintendents of the poor may bring suit in their corporate name to recover for the support of a pauper illegally removed from another state into this State. 154 (2).

See PAUPERS (2).

SURETY.

The liability of a surety in a bastardy case cannot exceed that of his principal. 30.

SYNONYMOUS TERMS.

Charging a sale of liquor "as a beverage" is equivalent to charging that the liquor was sold "to be used as a beverage. 587 (1).

TAXES.

1. *Statutory* certificates of taxing officers cannot be contradicted in *collateral* proceedings. 181 (1).
2. A return by the marshal of the city of Grand Rapids of his inability to find any personal property in the possession of the person chargeable with the payment of taxes, out of which to collect the same, is a *condition precedent* to a valid sale of the land upon which said taxes are assessed, and in the absence of such return the existence of such personal property may be shown to defeat such sale. *Id.* (2).
3. The validity of the provision of the charter of the city of Grand Rapids requiring the marshal to levy upon *any* personal property found *on the premises* assessed, to satisfy such assessment, is questioned, but not decided. *Id.* (3).
4. The authority of a township board to vote money for township expenses depends upon the *neglect* or *refusal* of the qualified electors to vote the sums necessary to defray the *ordinary* township expenses at the *annual* township meeting; which neglect or refusal must be shown by the record of the board, and also that the sum voted is for *ordinary* township expenses. 316 (2).
5. In order to authorize a township board to vote money at a special meeting, to be raised by taxation, the record must show that all of the four members were notified of or were present at such meeting. *Id.* (3).

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TAXES.—Continued.

6. The adoption by a board of supervisors of the report of its committee on agriculture, recommending the appropriation of $300 to a county agricultural society, and of its finance committee, including in its schedule of sums to be raised by taxation "agriculture, $300," will authorize the raising of said sum as a part of the county tax, if the proper certificate is filed. *Id.* (4).

7. An heir cannot set up an adverse claim to land of which his father died seized, under a tax title purchased after his death, and paid for by his grantor to protect his covenants of warranty, pursuant to an agreement made with the father in his life-time, under which deed the heir claims to hold *adverse* possession, such title belonging equitably to the estate. 408 (1).

8. A widow who has secured a conveyance from all the heirs but one of her husband's estate, and is in possession under such title and her dower and homestead rights, cannot acquire an adverse title as to such heir by purchasing an outstanding tax title paid for by her husband's grantor to protect his covenants of warranty, pursuant to an agreement made with the husband in his life-time, nor can her grantee, with knowledge of all of the facts, do so. *Id.* (2).

TERRITORIAL LIMITS.

The territorial limits of a school-district may embrace an *acreage* equal to nine *full* sections of land according to the United States survey. 143 (2).

TIME OF PERFORMANCE.

1. Where the *time* of performance of a contract, as fixed by the parties, becomes impossible by reason of the non-happening of an event, a contingency not contemplated by the parties, and no other time has been agreed upon, performance is excused. 477 (1).

2. It is not competent, by pleading a change of circumstances from those the parties contemplated and engaged with reference to as to time of performance, which always forms an essential element in every contract, to substitute a new condition and different time. *Id.* (2).

TITLE TO LAND.

It is not usual or very safe to have the title to lands settled before a justice of the peace, and, whatever looseness may be tolerated in small controversies, the statute does not allow such

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TITLE TO LAND.—Continued.

important questions as those which relate to farm bounds and highways to be dealt with except in such a way as to leave no room for doubt as to the meaning of the record. 561 (2).

See TRESPASS.

TOWNSHIP BOARD.

1. Questions of the existence of a school-district, and the title of its officers, are judicial in their nature, and not within the jurisdiction of the township board. 143 (1).
2. A township board is a body of *special* and *limited* jurisdiction, which must appear upon the face of their records. 316 (1).

See APPEAL; TAXES (4, 5).

TRANSFER OF SUIT.

1. A petition for the removal of a cause under How. Stat. § 6495, which states that the presiding judge was counsel for the petitioner, and assisted her in selecting a jury on a former trial, and that, on the case being called for a second trial before him, he announced that he could not try it, as he had been so interested before assuming his duties as judge, is sufficient to give jurisdiction. 445 (1).
2. On *certiorari* from a circuit court commissioner to review proceedings for transferring a suit to another circuit on account of interest, etc., of the presiding judge, in the absence of conflict of testimony, the Court will determine as a question of law, whether the commissioner was correct in his conclusion; but, if such conflict exists, the finding of the commissioner must control. *Id.* (2).

TRESPASS.

1. To maintain trespass, the plaintiff must have either *actual* or *constructive* possession of the land, and *constructive* possession cannot exist where there is an *actual* adverse possession. 353 (1).
2. Trespass, under the statute, may be brought by the landowner, regardless of the question of possession. *Id.* (2).
3. In an action of trespass against one in possession, the burden of proof is upon the plaintiff to show title to the land trespassed upon. *Id.* (3).
4. The measure of damages in a statutory action of trespass is the value of the timber if standing, and the diminished value of the estate by reason of its removal. *Id.* (4).

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TRESPASS.—Continued.

5. The price at which timber cut by a trespasser sold, less the cost of cutting and marketing it, is some evidence of its value, though not conclusive. *Id.* (5).

See NOTICE OF TITLE.

TRUST—See ACTION.

VERIFICATION OF PETITION.

Under a statute requiring a petition in a street-opening case to be verified by the city attorney, "or by some person having knowledge of the facts," an affidavit of that officer that "the petition is true to the best of his knowledge and belief" is sufficient. 455 (5).

WAIVER.

1. All but *jurisdictional* defects are waived by appealing to the township board from the action of a highway commissioner in laying out a highway. 33 (3).
2. A grantee in a deed conditioned for the non-sale of liquor on the premises, may consider the assent of the grantor to such sale by other parties in the same village, as a waiver of the condition for its non-sale attached to the sale of lands therein, until notified to the contrary. 87 (3).

WARRANTY—See EVIDENCE (2).

WILL—See DISPOSITION OF PROPERTY.

WITNESS.

1. The uncorroborated testimony of a witness, who is impeached by the plaintiff, will not warrant a verdict in his favor. 66 (3).
2. The assignor of an account filed against the estate of a deceased person may be asked on cross-examination the purpose of such assignment, and, if shown to have been to make him a competent witness, he cannot testify to the account, if otherwise competent. 397 (1).

See CHARGE TO JURY (9); EVIDENCE (12); SUBSCRIBING WITNESS.

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